# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 197.

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THE BOSTON AND ALBANY RAILROAD COMPANY,
PLAINTIFF IN ERROR,

*vs.*

PATRICK J. O'REILLY.

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

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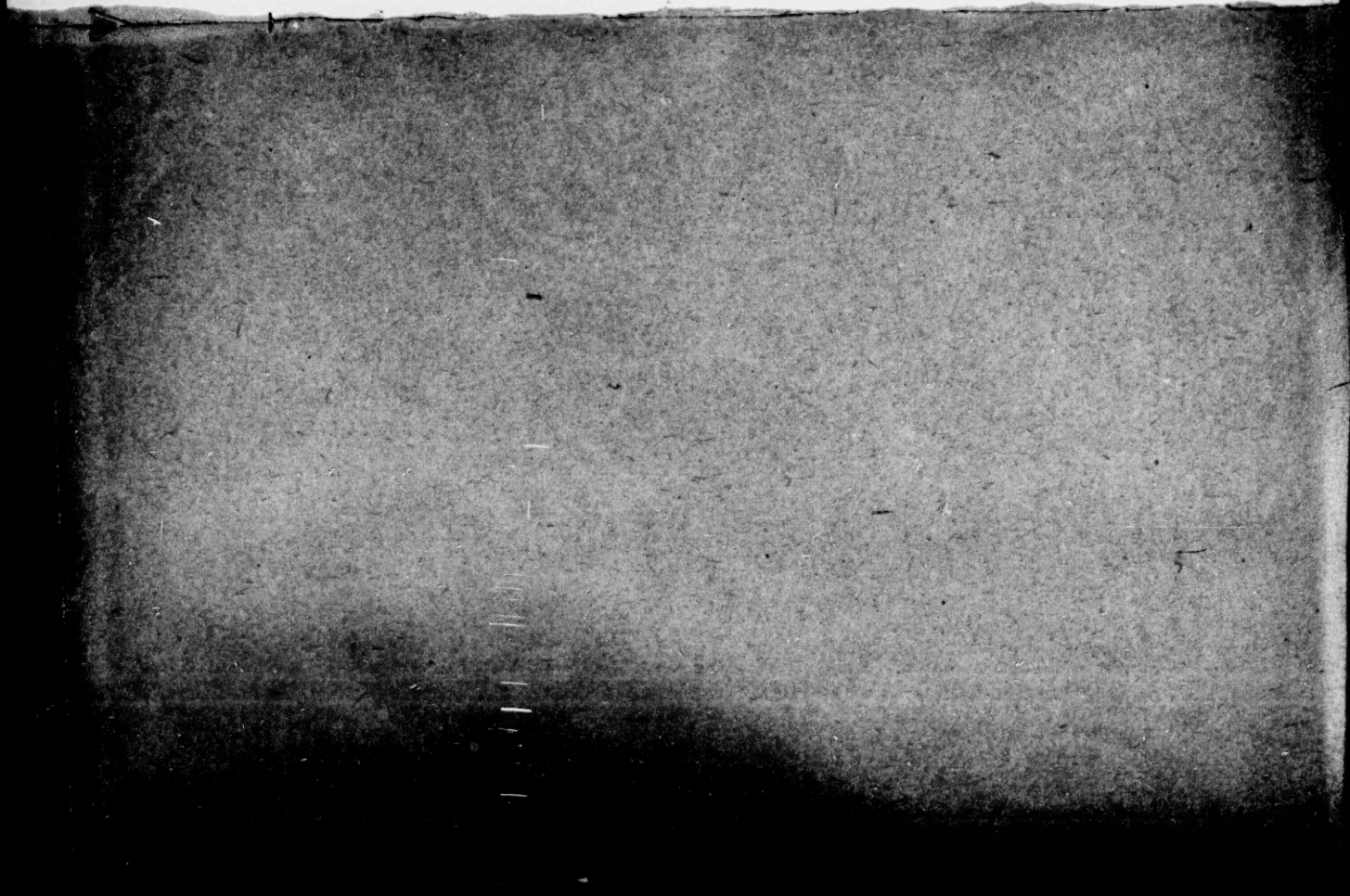
FILED JUNE 15, 1891.

(14,683.)



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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 11, 1894.

1 UNITED STATES OF AMERICA, *ss:*

Seal of the Circuit Court, Massachusetts.

The President of the United States to the honorable the judges of the circuit court of the United States for the district of Massachusetts, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Patrick J. O'Reilly, a citizen of Great Britain, a subject of Her Majesty Queen Victoria, an alien, and a resident of Framingham, in the county of Middlesex and Commonwealth of Massachusetts, plaintiff, and The Boston and Albany Railroad Company, a corporation duly established and existing by law, having its usual place of business in Boston, in the county of Suffolk and district of Massachusetts, and which is a citizen of said Commonwealth, defendant, in an action of tort, a manifest error hath happened, to the great damage of the said defendant, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the fifteenth day of June next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done herein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the twenty-second day of May, in the year of our Lord one thousand eight hundred and ninety-one.

JOHN G. STETSON,
*Clerk of the Circuit Court of the United States,*
*District of Massachusetts.*

Allowed by—
THOS. L. NELSON, *D. J.*

2 Circuit Court of the United States, District of Massachusetts, *ss:*

And now, here, the judges of the circuit court of the United States in and for the district of Massachusetts make return of this writ by annexing hereto and sending herewith, under the seal of the said circuit court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In testimony whereof I, John G. Stetson, clerk of said circuit court of the United States in and for the district of Massachusetts, have hereto set my hand and the seal of said court this first day of June, A. D. 1891.

Seal of the Circuit Court, Massachusetts.

JOHN G. STETSON, *Clerk.*

3 UNITED STATES OF AMERICA, *Massachusetts District*, } *ss:*

At a circuit court of the United States for the first circuit begun and holden at Boston, within and for the district of Massachusetts, on Wednesday, the fifteenth day of October, in the year of our Lord one thousand eight hundred and ninety, before the Honorable Le Baron B. Colt, circuit judge.

4 PATRICK J. O'REILLY, a Citizen of Great Britain, a Subject of Her Majesty Queen Victoria, an Alien, and Now a Resident of Framingham, in the County of Middlesex and Commonwealth of Massachusetts, Plaintiff,

*v.*

BOSTON AND ALBANY RAILROAD COMPANY, a Corporation Duly Established and Existing by Law, Having its Usual Place of Business in Boston, in the County of Suffolk and District of Massachusetts, and a Citizen of the Commonwealth of Massachusetts, Defendant.

3296, Law Docket.

In an action of tort.; *ad damnum*, $50,000.

*Declaration.*

(Filed with writ.)

First count. And the plaintiff says the defendant is a corporation owning and operating a railroad between Boston, in said county of Suffolk, and Albany, in the State of New York; that on or about the 4th day of January, A. D. 1887, the plaintiff was a passenger on said railroad, and by reason of the improper and negligent construction and want of repair of a certain truck attached to the tender of the engine which drew the train in which said plaintiff was then a passenger said car in which the plaintiff was riding was thrown from the track and the plaintiff was thereby severely hurt; that the defendant did not use due care in reference to procuring, constructing, maintaining, and repair of said truck and said train of cars in which said plaintiff was riding, but said plaintiff did use due care in all respects; that the plaintiff was put to great expense for medicine, medical attendance, and nursing.

Second count. And the plaintiff says the defendant is a corporation owning and operating a railroad, as set forth in the first count; that on or about the 4th day of January, A. D. 1887, the plaintiff

was a passenger on said railroad, and by reason of the insufficiency of the journal of the tender of the engine which hauled the car in which he was riding the plaintiff was hurt. The defendant did not use due care in reference to said journal, but the plaintiff did use due care.

By his attorneys, BENJ. F. BUTLER,
FRANK L. WASHBURN.

The writ in this cause is dated the twenty-seventh day of September, A. D. 1889, and was duly entered at the October term of this court, A. D. 1889, when and where the parties appeared by their respective attorneys.

This cause was thence continued from term to term to this present October term, when the following motion to amend declaration is filed and allowed by the court, the Honorable Thomas L. Nelson, district judge, sitting.

5 *Motion to Amend Declaration.*

(Filed and allowed November 19, 1890.)

And now comes the plaintiff and moves to amend his declaration by adding thereto the following count:

Third count. And the plaintiff says the defendant is a corporation owning and operating a railroad between Boston, in the county of Suffolk, and Albany, in the State of New York; that on or about the 4th day of January, A. D. 1887, the plaintiff was a passenger on one of its passenger trains on said railroad, and by reason of the improper condition and want of repair of the defendant's track, rails, and road-bed at or near West Springfield, in said Massachusetts, and the improper management and control of said passenger train, the car in which the plaintiff was such passenger was thrown from the track and upon and against another car or engine and the plaintiff was thereby severely injured; that the defendant did not use due care in reference to constructing, maintaining, repairing, and keeping in repair said tracks, rails, and road-bed, but negligently suffered them to be and remain out of repair, and negligently managed and controlled said passenger train; that the plaintiff was in the exercise of due care in all respects and was put to great expense for medicine, medical attendance, and nursing.

B. F. BUTLER.
FRANK L. WASHBURN.

At the said October term the following answer is filed:

*Answer.*

(Filed November 19, 1890.)

Now comes the defendant and denies each and every allegation in the plaintiff's writ, declaration, and amended declaration contained.

By its attorneys, STROUT & COOLIDGE.

Issue being thus joined, the cause, after a full hearing—the Honorable Thomas L. Nelson, district judge, sitting—is committed to a jury, sworn according to law, to try the issue, who, after hearing all matters and things concerning the same, return their verdict therein and upon oath say, to wit, December 10, 1890: "The jury find for the plaintiff and assess damages in the sum of fifteen thousand dollars ($15,000)."

The following bill of exceptions, presented by the defendant, is allowed by the court and filed in this cause:

6 *Defendant's Bill of Exceptions.*

(Allowed and filed March 26, 1891.)

This was an action of tort brought to recover damages for injuries received by the plaintiff at West Springfield, Massachusetts, January 4th, 1887, alleged to have been caused by the negligence of the defendant, a common carrier of passengers. The pleadings as amended are as follows:

*"Plaintiff's Declaration.*

First count. And the plaintiff says the defendant is a corporation owning and operating a railroad between Boston, in said county of Suffolk, and Albany, in the State of New York; that on or about the 4th day of January, A. D. 1887, the plaintiff was a passenger on said railroad, and by reason of the improper and negligent construction and want of repair of a certain truck attached to the tender of the engine which drew the train in which said plaintiff was then a passenger said car in which the plaintiff was riding was thrown from the track and the plaintiff was thereby severely hurt; that the defendant did not use due care in reference to procuring, constructing, maintaining, and repair of said trucks and said train of cars in which said plaintiff was riding, but said plaintiff did use due care in all respects; that the plaintiff was put to great expense for medicine, medical attendance, and nursing.

Second count. And the plaintiff says the defendant is a corporation owning and operating a railroad as set forth in the first count; that on or about the 4th day of January, A. D. 1887, the plaintiff was a passenger on said railroad, and by reason of the insufficiency of the journal of the tender of the engine which hauled the car in which he was riding the plaintiff was hurt. The defendant did not use due care in reference to said journal, but the plaintiff did ase due care.

Third count. And the plaintiff says the defendant is a corporation owning and operating a railroad between Boston, in the county of Suffolk, and Albany, in the State of New York; that on or about the fourth day of January, A. D. 1887, the plaintiff was a passenger on one of its passenger trains on said railroad, and by reason of the improper condition and want of repair of the defendant's track, rails, and road-bed at or near West Springfield, in said Massachu-

setts, and the improper management and control of said passenger train the car in which the plaintiff was such passenger was thrown from the track and upon and against another car or engine and the plaintiff was thereby severely injured; that the defendant did not use due care in reference to constructing, maintaining, repairing, and keeping in repair said tracks, rails, and road-bed, but negligently suffered them to be and remain out of repair and negligently managed and controlled said passenger train; that the plaintiff was in the exercise of due care in all respects and was put to great expense for medicine, medical attendance, and nursing."

7 "*Defendant's Answer.*

And now comes the defendant and for answer denies each and every allegation in the plaintiff's writ, declaration, and amended declaration contained."

The train upon which the plaintiff was riding as a passenger for hire was running east upon almost a straight line through West Springfield at the rate of about thirty miles per hour, according to the testimony of the defendant, and at a much greater rate, according to the testimony of the plaintiff. The defendant offered evidence tending to show that as the train approached the scene of the accident a journal under the tender broke, and that this was the cause of the accident.

The plaintiff offered evidence tending to show that the cause of the accident was a switch defectively placed and an excessive rate of speed of the train.

The defendant offered evidence tending to show that it had used the utmost caution and the highest possible care in equipping its train, and the plaintiff offered evidence tending to show the contrary.

The plaintiff offered evidence tending to show that he had received injuries causing heart trouble, lung difficulty, and trouble with his urine, which were permanent injuries, a large number of cuts and bruises, which healed shortly after the accident, and a further injury near his left knee, from which he had not recovered, and that his knee had become permanently stiff. There was evidence also tending to show other injuries.

The defendant admitted that the plaintiff had received injuries at the time of the accident, and offered evidence tending to show that he had fully recovered from all his injuries, except from the injury to his left leg. There was conflicting testimony in regard to the permanency of the last-named injury.

The plaintiff offered evidence tending to show that he had used due care in procuring a suitable surgeon to attend him after the accident, and the defendant offered evidence to the contrary.

1. Upon direct examination the plaintiff testified as follows:

Q. For five years, sir—that is far enough to go back; my brother can go farther if he likes—what was your business?

A. Steam thresher for three months in the fall.

Q. A movable thresher?
A. Yes, sir.
Q. How many months in the year did you work at that?
A. Well, about three.
Q. What did you do at other times?
A. I did general jobbing of any kind that I got—teaming lumber at times, and such as that; took a contract of any kind.
Q. About what did you make—oh, did you work at the business yourself?
A. Yes, sir.
Q. Ran an engine?
A. Yes, sir.
Q. Fed the boiler?
A. Yes, sir.
Q. Fed the hopper?
A. Yes, sir; any part of the business.
8 Q. You worked at about all of it. About how much did you earn a year by that?

Mr. STROUT: I object, your honor.
The COURT: Admitted.
Mr. STROUT: I take an exception.
Gen. BUTLER: I suppose, may it please your honor, this is the ground to put it upon: what has he lost?
The COURT: I admit the question. Let the stenographer note the exception.

Q. Well, about how much did you make at that? State it fully.
A. The first year that I ran the steam thresher I made, $1,200 clear of all expenses; the second year, $900; the third year, $1,000; the fourth year, $900; and the last year, $750.
Q. Did you have partners any of that time?
A. Yes, sir.
Q. Did they divide with you?
A. Yes, sir.
Q. What part of the time did you have partners?
A. The first two years and the last year.
Q. Outside of that—that took you, you say, three or four months in the year?
A. Yes, or about that.
Q. Did you own your steam-engine?
A. Yes, sir.
Q. Thesher. What could you make outside of that, off time?
A. Well, I couldn't exactly say.
Q. Are you a machinist by trade?
A. No, sir.
Q. Well, sir, look it all over and take it the four years, take it the five years, and how much did you average a year income from your labor?

Mr. STROUT: That is also subject to my objection.
The COURT: I admit it.

Mr. STROUT: And your honor will save my exception.

Gen. BUTLER: From his own individual efforts.

Mr. STROUT: If your honor please, will it be necessary for either Gen. Butler or myself to specifically save each exception?

The COURT: I suppose so; yes. No exceptions are allowed except those that are saved.

Mr. STROUT: I never make an objection unless I mean to except if the court admits it.

The COURT: No exceptions will be allowed except those that are actually taken at the trial on either side.

Mr. STROUT: Is it necessary for me to state the reasons of my——

The COURT: Not unless the court requests it, unless there is some special thing you desire to speak on.

Mr. STROUT: I find that the practice varies in the different circuits in relation to that. In the trial of a civil cause here, while I desire to save all rights, I do not want to take any more time than is necessary. I will state my reasons if that is necessary in order to save my exceptions.

The COURT: I do not think it is necessary.

(By Gen. BUTLER): Give the jury your best——

The COURT: It might very well happen that testimony might be admissible for some purposes and not for others. In that case I suppose it might be necessary for you to state upon what ground you except.

Mr. STROUT: Well, the first exception that I took was upon the ground that it was not competent to put in the profits of the
9 business, because that depends upon so many outside matters that it is too remote.

The COURT: Yes, I ruled upon that.

To the ruling of the court admitting the foregoing testimony the defendant duly and seasonably excepted.

2. The plaintiff further testified upon direct examination as follows:

(By Gen. BUTLER:)

Q. Now, you may answer the question, the court says, Mr. O'Reilly, how much a year did you make fairly by your own individual exertion?

Mr. STROUT: I object to that, may it please your honor.

Gen. BUTLER: I believe that is the question that has been ruled in.

The COURT: I ruled that in, and your exception, I understand, has been taken and noted.

A. I will make you an estimate of a thousand dollars.

Q. A thousand dollars a year?

A. Yes, sir.

To the ruling of the court admitting this testimony the defendant duly excepted and objected that it was not competent to put

in the profits of the business, because that would depend upon so many outside matters and was too remote.

The court made no ruling that the plaintiff might prove the profits of his business.

3. It further appeared that the plaintiff had sold his threshing business the fall before the accident; that he had sold the good will and everything connected with the business, except the horses and harnesses with which the machine was moved about.

On redirect examination the plaintiff testified as follows:

Q. When you sold out, you did it with the intention of continuing the business?

Mr. STROUT: That I object to.
The COURT: That I admit.
Mr. STROUT: That is subject to my exception.
The COURT: Your exception will be noted.

A. Yes, sir.

To the ruling of the court admitting this testimony the defendant duly and seasonably excepted.

4. Mrs. LAHEY, the sister of the plaintiff, was a witness called in his behalf; she kept a boarding-house and the plaintiff, after the accident, made his home with her. She testified that she had acted as his nurse during his sickness, and that about ten months after the accident sores and ulcers had broken out about the knee. There was no evidence that she was a professional nurse or a physician. The plaintiff himself testified that on the 11th of October, 1887, he had taken a piece of nail from one of these sores and that the nail had been lost. The size and shape of the nail was in dispute.

Upon her direct examination she testified as follows:

Q. Did you hear him testify anything about this nail?
A. No, sir.

Q. You were out of the court-house a while, weren't you, when he was testifying?

A. Yes, sir; I was.

Q. Now, then, tell the jury, if you know, how you know it came out there and all about it.

A. I was not there when it came out. He called my attention to it just after it did come out.

Q. Where was he when it came out?

A. I think he was in his room.

Q. He called your attention to it, you say?

A. Yes, sir.

Q. Did he call your attention to the sore at the same time?

A. Well, no, he didn't, to the sore at the same time, because he used to pick it. It used to bother him and he would take the poultices off.

Q. Won't you repeat that a little louder?

A. The sore used to bother him and he would take the poultices

off his knee, and I told him not to take the poultices off. But he didn't show me the sore at the time, but he told me he had taken the nail out of his knee.

Mr. STROUT: That is improper.

The COURT: I do not understand that it is contended that she saw the nail come out, but that her brother told her about it.

Mr. STROUT: Can it be possible that what her brother told her is evidence here in this court?

The COURT: I suppose it is admissible, followed up by her description of the nail—what it was.

Mr. STROUT: I object to the question and take an exception.

The COURT: That you can do.

Mr. STROUT: This conversation with her brother is manifestly, it seems to me, incompetent.

The COURT: I must judge, not you, of the competency of it; I rule it in.

Q. Did you examine the nail?

A. Yes, sir.

Q. Look at that nail. Will you tell me how it appeared? Perhaps you can describe it by that.

A. Well, I should think it was about like that—somewhere about like that.

Q. Now, after he showed you the nail, about how long before that abscess healed up, if it did heal?

To the ruling of the court admitting this testimony the defendant duly and seasonably excepted.

The testimony objected to was admitted for the purpose of showing the identity of the nail described by the witness with that taken from the wound on the plaintiff's leg.

5. The plaintiff and Mrs. Lahey further testified that soon after the accident a black-and-blue spot became visible near the region of the heart, and she further testified as follows upon direct examination:

(By Gen. BUTLER:)

Q. And what complaints did he make of that black spot?

A. He complained of his heart.

Mr. STROUT: I object to that, your honor.

Gen. BUTLER: I insist upon that.

The COURT: You may ask the question.

11 Mr. STROUT: I except to its admission, your honor.

A. He complained of his heart.

Q. How early was that complaint?

A. Well, I should think he complained of it the very first day he came to the house.

To the ruling of the court admitting this testimony the defendant duly and seasonably excepted.

6. Mrs. Lahey further testified upon direct examination as follows:

Q. How long did Dr. McCann treat him?
A. He treated him ever since it happened—that is, since the 5th of January.
Q. How often did he use to call for the first two years?
A. Well, sometimes twice a day, and sometimes three times a day, or any time he was called on outside of his regular visits.
Q. Would he be sent for, ever?
A. Yes, sir.
Q. What for?
A. Well, when he had those bad spells I always sent for the doctor.
Q. When he had what?
A. When he had those bad spells, real bad spells.
Q. You sent for the doctor. State whether he has suffered pain and how long he has suffered pain.

Mr. STROUT: I object to that, your honor.
The COURT: You may ask the question.
Mr. STROUT: I take an exception, your honor.
The COURT: Note the exception.

A. He has suffered pain right along, and he does sometimes now.

To the ruling of the court admitting this testimony the defendant duly and seasonably excepted.

7. Mrs. Lahey further testified upon direct examination as follows:

Q. Whether he made complaints of the pain to you when he suffered pain?
A. Yes, sir.

Mr. STROUT: I urge the same objection.
Gen. BUTLER: The other might be questionable, but complaints made by sick people to nurses are always admissible.
The COURT: I admit it.
Mr. STROUT: I am obliged to take the second in order not to waive the first.
The COURT: You have taken it and I have allowed it.
Mr. STROUT: I do take it.
Gen. BUTLER: I think I am entitled to it, because it may be that the former question——
The COURT: I admit it, and you can ask the question.
Mr. STROUT: I object to it for matter of substance and not of form.

Q. You nursed him?
A. Yes, sir.

To the ruling of the court admitting this testimony the defendant duly and seasonably excepted.

8. Dr. McCann, the attending physician, was a witness for the plaintiff, and upon direct examination he testified that in
12 October, 1887, ulcers broke out upon and about the knee; that he treated them antiseptically, and gave it as his opinion that some foreign substance or disease of the bone would be a sufficient cause for the ulcers. He further testified upon direct examination as follows:

Q. At last did he produce to you anything which he took out from there, as he said?

A. Yes, sir.

Q. What was it?

A. It was a piece of a nail. When I called in one morning he told me that came out during the night.

(Answer objected to, admitted, and exception taken.)

Q. If the end of that nail (nail handed witness) represents the piece you saw, won't you tell us about it?

A. Yes, sir; it would be about that size.

Q. A piece of nail how long?

A. Seven-eighths of an inch it measured.

Q. You measured it?

A. Yes, sir.

Q. Was it broken off?

A. It was split at the broken part; the upper end of it was split, spread apart.

To the ruling of the court admitting this testimony the defendant duly and seasonably excepted.

The plaintiff testified that he showed the nail both to Dr. McCann and Mrs. Lahey.

9. Dr. McCann, upon direct examination, further testified as follows:

Q. Now, will you tell us, you, his physician, go there, and he told you what about where this nail came from?

(Objected to, admitted, and exception saved.)

A. On the morning of the 11th of October I went in on my usual call, and he showed me this piece of nail, saying it came out of his knee during the night.

Q. Did he tell you whereabouts from the knee?

A. Yes, sir; I saw the place.

Q. You have seen his leg lately. Does the place where he shew you the mark of it still remain?

A. Yes, sir.

Q. Well, sir, if that was in there, in your judgment as a medical man state whether that was competent, in your judgment as a medical man, to account for this breaking out of the ulcers?

A. Yes, sir.

To the ruling of the court admitting this testimony the defendant only excepted.

10. Dr. McCann, the physician, further testified as follows upon direct examination:

Q. Within your surgical knowledge are you conscious or do you know of having omitted to do anything in regard to moving that leg which would make it better?

(Objected to, admitted, and exception saved.)

A. No, sir.

13 To the ruling of the court admitting this testimony the defendant duly and seasonably excepted.

11. Dr. CILLEY, a physician called by the plaintiff as an expert, who had examined the plaintiff upon three different occasions, but had made no examination with a view of treating him or of trying to get him well, but who went to find out what his condition was, upon direct examination testified as follows:

Mr. BUTLER: I will put the question, if you will wait, Doctor, and do not answer until my brother has time to object.

Q. Whether that leg is better off than on or better on than off, in your judgment as a physician?

Mr. STROUT: I object to the question.
The COURT: I think it is competent.
Mr. STROUT: I take an exception.
The COURT: Do you wish to except?
Mr. STROUT: Yes, sir.
The COURT: Just note the exception.

A. Most every person would prefer a leg on, even if it was stiff. He would get along better if it was off. He would walk better, could work better with it off than on.

Q. What is the disadvantage, Doctor, in your opinion, of having that leg to carry about with him?

A. It is in the way. He cannot sit down without swinging it around in front of him, he cannot walk, he must go upstairs backwards, and it is impossible for him to do many kinds of labor which he could do if that leg was away.

To the ruling of the court admitting this testimony the defendant duly and seasonably excepted.

12. Dr. Cilley further testified in direct examination as follows:

Q. Did you see, Doctor, anything in Dr. McCann's treatment of him, or what it had been, that you could find objection to?

Mr. STROUT: I object to the question.
The COURT: I think it is competent. I do not see any objection to it.
Mr. STROUT: I object to it because it is not competent to ask in a general way what he has asked. However, if your honor will allow me an exception to the question——
The COURT: Yes, sir.
Mr. BUTLER: You may answer the question.

A. As far as I understood his treatment, I saw nothing to except to, so far as he explained it to me.

Mr. STROUT: I object to the answer also.
The COURT: Well, the answer is admitted and the exception is allowed.

To the ruling of the court admitting this testimony the defendant duly and seasonably excepted.

13. Dr. McCann was recalled by the plaintiff at the end of his case and examined the plaintiff's leg in the presence of the
14 jury. He testified on direct examination as follows:

Gen. BUTLER: I will alter the question.

Q. Where is the scar of the hole that your patient showed you it came out through?

Mr. STROUT: I object to that.
The COURT: That I admit.
Mr. STROUT: I take an exception.

A. There (pointing).
Q. Where are the scars of the other ulcers?
A. There is one and there is the other.

To the ruling of the court admitting this testimony the defendant duly and seasonably excepted.

14. The defendant contended that it used the highest degree of care in regard to maintaining its road-bed, and in this connection, upon direct examination, a witness, Mr. ALGER, who was in charge of the division of the road at and near the place of the accident and who was called by the defendant, testified upon direct examination as follows:

Q. Now, will you state to the jury what the Boston and Albany railroad—what force they had, what kind of men they had, and what they did in order to keep it in condition, and what inspection was made of it?

Mr. BUTLER: I object, may it please your honor.
NELSON, J.: Well, that is another question entirely.
Mr. STROUT: Well, if there is any question made—Brother Butler has introduced an amendment here saying that the track was out of order, and I understand him to say that he proposes to argue it, although he has no testimony of it in connection with and as the cause of the accident. Now, if that be true, I want to show as an answer to it what the Boston and Albany did in order to keep its tracks in a perfect condition.
NELSON, J.: That you may do.
Mr. BUTLER: I have no objection to that.
NELSON, J.: As I understand you now, you are going on to show they had men employed?
Mr. STROUT: Yes, competent men; and I want to show what their connection was with this work.

NELSON, J.: Do you object to that?

Mr. BUTLER: I object to that because it is entirely immaterial. The fact that they had competent men to do the work does not by any means prove it was done and does not excuse them; their only excuse is if they had it done.

NELSON, J.: I will exclude that; I will rule it out.

Mr. STROUT: I will take an exception, if your honor please.

Q. Now you say you visited this place after the accident?

NELSON, J.: You understand what the ruling is? I understand you to offer to prove that the Boston and Albany railroad employed competent men to take care of this track?

Mr. STROUT: I wish to ask a little further.

NELSON, J.: That is all I excluded.

Mr. STROUT: Will you read the question? I suppose it is on the ground that they have competent men until the contrary is shown?

15 NELSON, J.: That is one ground. There is no attack on the man. All that is shown, that the accident happened. Will you read the question?

Q. (as read). Now, will you state to the jury what the Boston and Albany railroad—what force they had, what kind of men they had, and what they did in order to keep it in condition, and what inspection was made of it. (The word "it" in this question referred to the entire track of the railroad and not to the particular track in question.)

NELSON, J.: I think that question involving all those things together is incompetent. What they did there to keep this track in repair I do not say is not competent.

Mr. STROUT: Now, may it please the court, exactly what I wish to show is the fact that they had a force of competent men to make inspection of their track, and how often they inspected it, and that they were not in fault in relation to that matter; then I propose to support that and to enforce it by showing from other people besides this witness that the track was in pefect repair.

NELSON, J.: I don't think you have a right to show it by this witness—he knows nothing about what was done—to show that the company had competent men to take care of the track.

Mr. STROUT: Then I suppose the General has no right to argue, without any evidence, that they had not competent men.

Mr. BUTLER: He says that I must not argue that they had not competent men. I say I shall not only prove that, but I will undertake to prove it by their report, in which they said they were very careless, and in which they report three men killed.

Mr. STROUT: That is not so; it is not so in the report. It is only one of the statements you have made. I will save the exception as it is.

The court ruled that the defendant might show the condition of the track at the place in question and what was done to keep it in repair, but could not show that the defendant employed competent men to take charge of its track generally.

NELSON, J.: Well, I will rule that, and you may except to that if you please.

To this ruling the defendant duly and seasonably excepted.

15. Upon the direct examination of the plaintiff he proved that there had been an accident, causing the derailment of cars and injury to the plaintiff. The defendant thereupon offered testimony tending to show that the utmost care had been used by the defendant, and also tending to show that the cause of the accident was the breaking of the journal of an axle near the wheel, and that the utmost care was used by the defendant to detect and to prevent a break. Upon rebuttal, the plaintiff called J. V. MEIGS, an expert, who testified upon direct examination as follows:

Q. Now, from your knowledge, obtained from whatever source you have got, will you answer—leaving out the collisions, because I don't want to go into an examination of separate cases at all; they can do that as much as they like—what is the most fruitful cause of railroad accidents?

Mr. STROUT: That I object to.

16 The COURT: That I will admit.

Mr. STROUT: I except to it.

The COURT: And the exception is saved.

A. The breakage of axles, sir.

To the ruling of the court admitting this testimony the defendant duly and seasonably excepted.

The case was submitted to the jury with instructions, which were not objected to by either party.

The jury found a verdict for the plaintiff, assessing damages in the sum of fifteen thousand dollars; and thereupon this defendant comes into court with this its bill of exceptions, and, being prejudiced and aggrieved by the ruling of the court in each of the said exceptions, respectfully prays that the exceptions may be allowed.

By its attorneys, STROUT & COOLIDGE.

Examined, found to be correct, and allowed.

THOMAS L. NELSON, *D. J.*

It is thereupon considered by the court, to wit, May 14, A. D. 1891, the Honorable Thomas L. Nelson, district judge, sitting, that the said Patrick J. O'Reilly, plaintiff, recover of the said Boston and Albany Railroad Company, defendant, the sum of fifteen thousand three hundred and eighty-five dollars damages and his costs of suit, taxed at —.

A true record.

Attest: JOHN G. STETSON, *Clerk.*

The following is the assignment of errors filed by the defendant to be transmitted with the record.

*Assignment of Errors.*

(Filed May 15, 1891.)

This was an action brought and tried in said court, wherein the plaintiff sought to recover of the defendant for personal injuries, claimed to be permanent, alleged to have been received by him on the fourth day of January, A. D. 1887, and to have been caused by a defect in an axle of an engine tender of the train on which the plaintiff was riding as a passenger and by the defective condition of the track and switch near the place of the accident. The verdict in said case having been in favor of the plaintiff, and a bill of exceptions having been duly filed by the defendant and
17 allowed by the court, now comes The Boston and Albany Railroad, defendant, and makes the following assignment of errors and alleges that in said record and proceedings there is manifest error in this, to wit:

1. That the court, against seasonable objection and exception, permitted the plaintiff, O'Reilly, to testify that in the business in which he was engaged three or four months each year prior to the accident (but which, including goodwill and everything connected with the business, he had sold before the accident) he had made "the first year he run the business twelve hundred dollars clear of all expenses; the second year, nine hundred dollars; the third year, one thousand dollars, and the last year, seven hundred and fifty dollars."

2. That the court, against seasonable objection and exception, permitted the plaintiff, O'Reilly, to testify that he estimated he fairly made, by his own individual exertions, one thousand dollars per year.

3. That the court, against seasonable objection and exception, permitted the plaintiff, O'Reilly, after testifying that he had sold all the business, goodwill, and everything connected with the business, to answer in the affirmative the following question asked by his attorney: "When you sold out, you did it with the intention of continuing the business?"

4. That the court, against seasonable objection and exception, permitted Mrs. Lahey, the sister of O'Reilly, who acted as his nurse, to testify upon direct examination, in answer to questions of plaintiff's counsel, that the plaintiff had told her after the occurrence that he had taken a nail out of his knee. This nail had been subsequently lost.

5. That the court, against seasonable objection and exception, permitted Mrs. Lahey aforesaid to testify upon direct examination, in answer to question by plaintiff's counsel, that the plaintiff complained to her of his heart.

6. That the court, against seasonable objection and exception, permitted Mrs. Lahey aforesaid to testify upon direct examination, in answer to question of plaintiff's counsel, that the plaintiff had suffered pain right along since the accident.

7. That the court, against seasonable objection and exception, permitted Mrs. Lahey aforesaid to testify upon direct examination, in answer to question of plaintiff's counsel, that the plaintiff, O'Reilly, made complaint to her of pain when he suffered pain.

8. That the court, against seasonable objection and exception, permitted Dr. McCann, the attending physician, to testify upon direct examination, in answer to question of the plaintiff's counsel, that the plaintiff, O'Reilly, told him one morning that a piece of nail had come out of his knee during the night.

9. That the court, against seasonable objection and exception, permitted Dr. McCann, the attending physician, to testify upon direct examination, in answer to question of the plaintiff's counsel, as follows: "Q. Now, will you tell us, you, his physician, go there, and he told you what about where this nail came from? A. On the morning of the 11th of October I went in on my usual call, and he showed me this piece of nail, saying it came out of his knee during the night."

10. That the court, against seasonable objection and exception, permitted Dr. McCann aforesaid to answer in the negative the following question, put by plaintiff's counsel in direct examination: "Within your surgical knowledge, are you conscious or do you know of having omitted to do anything in regard to moving that leg which would make it better."

11. That the court, against seasonable objection and exception, permitted Dr. Cilley, an expert physician, who had made no examination with a view to treating the patient or of trying to get him well, to testify upon direct examination, in answer to question by plaintiff's counsel, as follows: "Q. Whether that leg is better off than on, or better on than off, in your judgment as a physician? A. Most every person would prefer a leg on, even if it was stiff; he would get along better if it was off; he would walk better, would work better with it off than on."

12. That the court, against seasonable objection and exception, permitted Dr. Cilley aforesaid to testify upon direct examination, in answer to question of plaintiff's counsel, as follows: "Q. Did you see, Doctor, anything in Dr. McCann's treatment of him or what it had been that you could find objection to? A. As far as I understood his treatment, I saw nothing to except to, so far as he explained it to me."

13. That the court, against seasonable objection and exception, permitted Dr. McCann, when recalled at end of plaintiff's case, in answer to question by plaintiff's counsel, to point out upon the plaintiff's leg the scar of the hole out of which the plaintiff had told him the nail had come.

14. That the court, against seasonable objection and exception, refused to permit the defendant to prove by the civil engineer who had charge of the track where the accident happened that it had competent men to keep its track in repair.

15. That the court, against seasonable objection and exception, permitted an expert engineer called by the plaintiff upon rebuttal

to testify upon direct examination that the most fruitful cause of railroad accidents, leaving out collisions, was the breakage of axles.

BOSTON AND ALBANY RAILROAD COMPANY,
By its attorneys, STROUT & COOLIDGE.

19 UNITED STATES OF AMERICA, }
*Massachusetts District,* } *ss:*

I, John G. Stetson, clerk of the circuit court of the United States for the first circuit and district of Massachusetts, certify that the foregoing is a true copy of the record of said circuit court in the cause entitled No. 3296, law docket, Patrick J. O'Reilly, plaintiff, *v.* Boston and Albany Railroad Company, defendant, lately determined in said circuit court, and of all proceedings therein and of the assignment of errors filed by the defendant.

In testimony whereof I hereunto set my hand and affix the seal of said circuit court, at Boston, in said district, this first day of June, in the year of our Lord one thousand eight hundred and ninety-one, and of the Independence of the United States the one hundred*th* and fifteenth.

Seal of the Circuit Court, Massachusetts.

JOHN G. STETSON, *Clerk.*

20 Know all men by these presents that we, The Boston and Albany Railroad Company, a corporation duly established by law, having its usual place of business in Boston, in the State and district of Massachusetts, as principal, and Moses Kimball, of Brookline, and John P. Spaulding, of Boston, both in said State and district of Massachusetts, as sureties, are held and firmly bound unto Patrict J. O'Reilly, a citizen of Great Britain, a resident of Framingham, in said State and district, in the full and just sum of thirty-five thousand dollars, to be paid to the said Patrick J. O'Reilly, his certain attorney, executors, administrat ors, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated the twenty-second day of May, in the year of our Lord one thousand eight hundred and ninety-one.

Whereas lately, at a circuit court of the United States within and for the district of Massachusetts, in a suit depending in said court between said Patrick J. O'Reilly, plaintiff, and the said Boston and Albany Railroad Company, defendant, judgment was rendered against the said defendant, and the said defendant, having procured a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said plaintiff, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington on the fifteenth day of June next:

Now, the condition of the above obligation is such that if the said defendant shall prosecute its said writ of error to effect and answer all damages and costs if it fail to make its plea good, then the above

obligation to be null and void; otherwise to remain in full force and virtue.

BOSTON AND ALBANY RAIL- [L. S.]
ROAD COMPANY,
By EDWARD D. HAYDEN, *Vice-President.*
MOSES KIMBALL. [L. S.]
JOHN P. SPAULDING. [L. S.]

Signed, sealed, and delivered in presence of—
C. E. STEVENS,
To E. D. Hayden and Moses Kimball.
W. S. SPAULDING,
To J. P. Spaulding.

Approved:
THOS. L. NELSON,
*U. S. District Judge.*

A true copy of the bond taken by the judge at the time of allowing the writ of error named in said bond, which bond is on file in the office of the clerk of the circuit court of the United States for the first circuit and district of Massachusetts.

Attest: JOHN G. STETSON,
*Clerk U. S. C. C., Mass. Dist.*

21 The United States of America to Patrick J. O'Reilly, a resident of Framingham, in the district of Massachusetts, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the fifteenth day of June next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States within and for the district of Massachusetts, wherein The Boston and Albany Railroad Company, a corporation duly established by law, is plaintiff in error and you are defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Thomas L. Nelson, district judge of the United States for the district of Massachusetts, sitting in said circuit court, this twenty-second day of May, in the year of our Lord one thousand eight hundred and ninety-one.

THOS. L. NELSON, *D. J.*

UNITED STATES OF AMERICA, *Massachusetts District,* } *ss:*

BOSTON, *May* 23, 1891.

I hereby certify that I have served the within citation on the within-named Patrick J. O'Reilly by giving to him in hand, at Framingham, a true an- attested copy of said citation.

F. X. MACDONALD,
*Deputy U. S. Marshal.*

*Fees.*

| | |
|---|---|
| Service | 2 00 |
| Copy | 1 00 |
| Tr. & exp | 2 25 |
| | 85 25 |

[Endorsed:] 1172. United States marshal's office, room 101, P. O. building, Boston, Mass., May 22, 1891.

Endorsed on cover: Case No. 14,683. Massachusetts C. C. U. S. No. 197. The Boston & Albany Railroad Company, plaintiff in error, *vs.* Patrick J. O'Reilly. Filed June 15, 1891.

Office Supreme Court, U. S.
FILED,
MAR 4 1895
JAMES H. McKENNEY,
CLERK.

# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1894.

TERM No. 197.

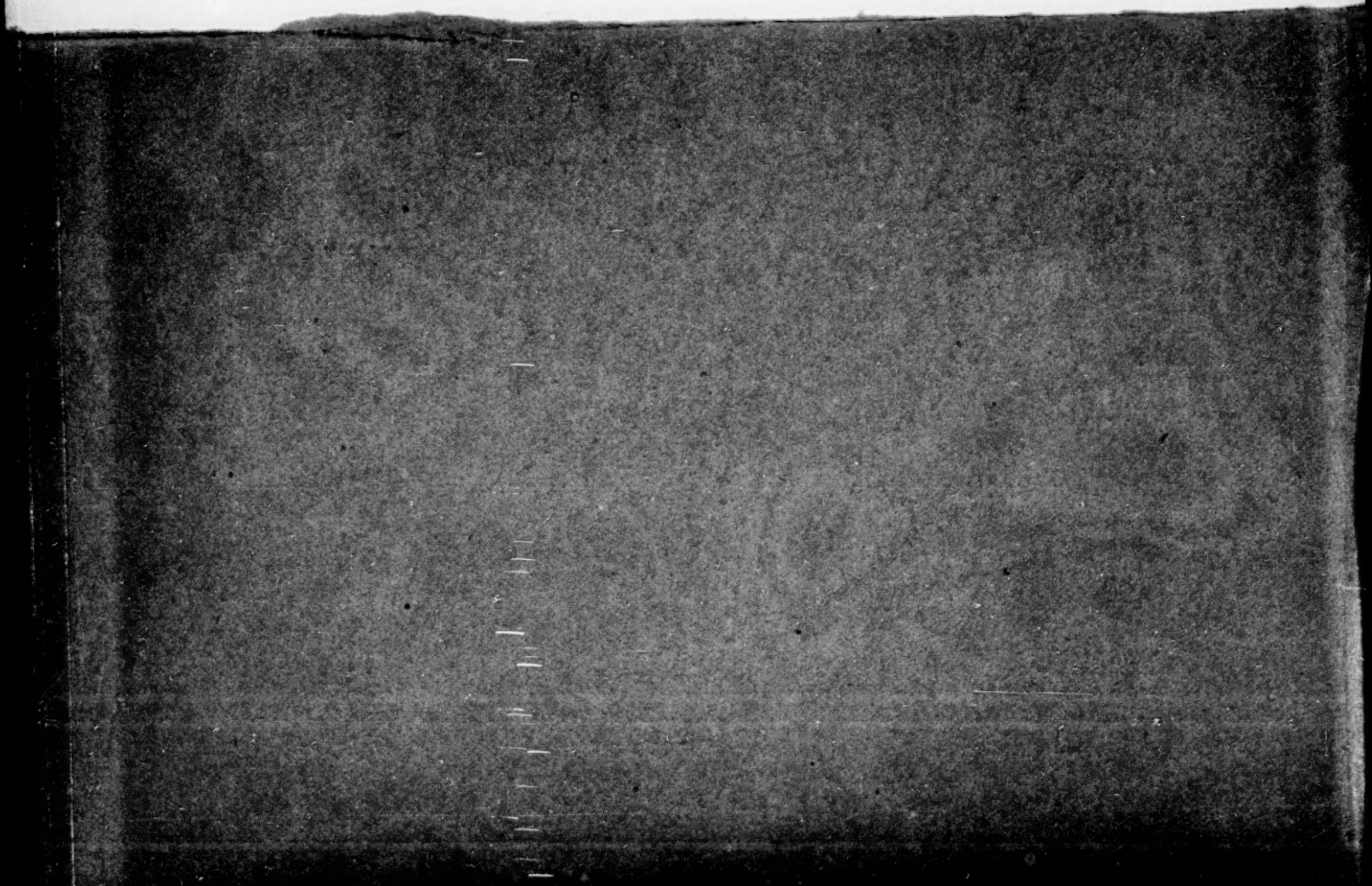
THE BOSTON & ALBANY RAILROAD COMPANY,
PLAINTIFF IN ERROR,

*v.*

PATRICK J. O'REILLY.

## BRIEF OF PLAINTIFF IN ERROR.

SAMUEL HOAR,
*Of Counsel.*



# Supreme Court of the United States.

**OCTOBER TERM, 1894.**

**No. 197.**

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THE BOSTON AND ALBANY RAILROAD COMPANY,

PLAINTIFF IN ERROR,

*v.*

PATRICK J. O'REILLY.

---

*BRIEF OF PLAINTIFF IN ERROR.*

## STATEMENT OF THE CASE.

This was an action of tort. The writ was dated September 27, 1889. The *ad damnum* was fifty thousand dollars. The declaration, as amended before the trial, contained three counts. In the first count the plaintiff alleged that on January 4, 1887, he was injured while a passenger upon defendant's railroad and while using due care, in consequence of a defective truck. The only further allegation as to damages is "that the plaintiff was put to great expense for medicine, medical attendance, and nursing." The second count alleged the injury to have been by reason of an insufficient journal, and contains no further allegation as to damages. The third count alleges the injury to have been by reason of the im-

proper condition of the defendant's track, rails, and roadbed, and the improper management of its train, and contains the same claim of damage as the first count. The answer was a general denial.

At the trial the plaintiff offered evidence tending to show that he was, on January 4, 1887, a passenger for hire upon an east-bound train on the defendant's railroad; that the train was running through the town of West Springfield, where the railroad is almost straight, at a rate much greater than thirty miles an hour; that the accident happened because of a switch defectively placed and because the train was going at an excessive rate of speed. He further offered evidence tending to show that he had received injuries causing heart trouble, lung difficulty, and trouble with his urine, which were claimed to be permanent, a larger number of cuts and bruises, which healed shortly after the accident, and an injury near his left knee, from which he had not recovered, and that the knee had become permanently stiff; that he had used due care in procuring suitable surgical attendance.

The defendant offered evidence tending to show that the train was going at a speed of about thirty miles an hour, and that a journal under the tender broke and caused the accident; that it had used the utmost caution and the highest possible care in equipping its train; it admitted that the plaintiff had received injuries at the time of the accident, and offered evidence tending to show that he had fully recovered from all his injuries except the injury to his left leg; that this injury was not permanent; and that he had not used due care in procuring suitable surgical attendance.

The plaintiff offered evidence to show that defendant had not used the utmost caution and the highest possible care in equipping its train.

The jury brought in a verdict for fifteen thousand dollars.

The questions presented in this case for the determination of the Court are those raised by the exceptions to the admission of evidence specified in the Assignment of Errors, except numbers 5, 6, 7, 10, and 11, which are waived. Number 14, containing an exception to the exclusion of evidence, is also waived.

## SPECIFICATION OF ERRORS RELIED UPON.

1. That the Court, against seasonable objection and exception, permitted the plaintiff, O'Reilly, to testify that in the business in which he was engaged three or four months each year prior to the accident (but which, including good-will and everything connected with the business, he had sold before the accident) he had made "the first year he run the business twelve hundred dollars clear of all expenses; the second year, nine hundred dollars; the third year, one thousand dollars; the fourth year, nine hundred dollars; and the last year, seven hundred and fifty dollars."

2. That the Court, against seasonable objection and exception, permitted the plaintiff, O'Reilly, to testify that he estimated he fairly made, by his own individual exertions, one thousand dollars per year.

3. That the Court, against seasonable objection and exception, permitted the plaintiff, O'Reilly, after testifying that he had sold all the business, good-will, and everything connected with the business, to answer in the affirmative the following question asked by his attorney: "When you sold out, you did it with the intention of continuing the business?"

4. That the Court, against seasonable objection and exception, permitted Mrs. Lahey, the sister of O'Reilly, who acted as his nurse, to testify upon direct examination, in answer to question of plaintiff's counsel, that the plaintiff

had told her after the occurrence that he had taken a nail out of his knee. This nail had been subsequently lost.

5. (Waived.)

6. (Waived.)

7. (Waived.)

8. That the Court, against seasonable objection and exception, permitted Dr. McCann, the attending physician, to testify upon direct-examination, in answer to question of the plaintiff's counsel, that the plaintiff, O'Reilly, told him one morning that a piece of nail had come out of his knee during the night.

9. That the Court, against seasonable objection and exception, permitted Dr. McCann, the attending physician, to testify upon direct-examination, in answer to question of the plaintiff's counsel, as follows:

"*Q.* Now, will you tell us, you, his physician, go there, and he told you what about where this nail came from?

"*A.* On the morning of the 11th of October I went in my usual call, and he showed me this piece of nail, saying it came out of his knee during the night."

10. (Waived.)

11. (Waived.)

12. That the Court, against seasonable objection and exception, permitted Dr. Cilley aforesaid to testify upon direct-examination, in answer to question of plaintiff's counsel, as follows:

"*Q.* Did you see, doctor, anything in Dr. McCann's treatment of him or what it had been that you could find objection to?

"*A.* As far as I understood his treatment, I saw nothing to except to, so far as he explained it to me."

13. That the Court, against seasonable objection and exception, permitted Dr. McCann, when recalled at end of plaintiff's case, in answer to question by plaintiff's counsel,

to point out upon the plaintiff's leg the scar of the hole out of which the plaintiff had told him the nail had come.

14. (Waived).

15. That the Court, against seasonable objection and exception, permitted an expert engineer called by the plaintiff upon rebuttal to testify upon direct examination that the most fruitful cause of railroad accidents, leaving out collisions, was the breakage of axles.

## POINTS AND AUTHORITIES.

### I. (E. 1, 2, and 3.)

In the United States Court for the District of Massachusetts it is error to permit the plaintiff to prove how much he earned or how much he made in business before the accident, unless it is alleged in his declaration that he claims special damage by loss of his earnings or injury to his business.

The Massachusetts Practice Act, originally enacted in 1851, and now found in Public Statutes of Massachusetts, Chapter 167, after providing that personal actions shall consist of actions of contract, of tort, and of replevin, proceeds as follows:

"SECTION 2. The form of declaring in personal actions shall be according to the following particulars:

"*First.* The action shall be named in conformity with the divisions specified in the preceding section.

"*Second.* No averment need be made which the law does not require to be proved.

"*Third.* The substantive facts necessary to constitute the cause of action may be stated with substantial certainty, and without unnecessary verbiage."

And later, in Section 94, where forms of declarations are given, after the first form for declarations in tort is the following statement:

"(The *ad damnum* is a sufficient allegation of damage in all cases in which special damages are not claimed)."

The provisions of this statute were construed by the Supreme Judicial Court of Massachusetts in

Baldwin *v.* Western R.R. Corp., 4 Gray, 333, 1855,

a case precisely in point. In that case, as in the case at bar, the only allegation of damage was that the plaintiff was greatly hurt and damaged. (The allegation in two of the counts of the declaration in the case at bar in regard to medicine, medical attendance, and nursing may be left out of the question, since no dispute exists concerning that element of damage.) The plaintiff, a woman, offered evidence of her education and learning and of the fact that she was a teacher, to enhance her damages, and the evidence was admitted by the trial judge. The Court held that this was error, as such evidence is of special damage, which cannot be proved unless alleged. They say: "We are of opinion that under the Practice Act, St. 1852, Chap. 312, a general allegation of damages at the end of the declaration will not entitle a party in an action of tort to prove special damages;" and they cite the note in parenthesis after the first form for declarations in tort in Section 94 as a "significant note" on this point. This case has been repeatedly cited with approval and followed, and it must be considered as settled law in Massachusetts that such evidence as the plaintiff put in concerning his earnings and business profits is inadmissible under a general allegation of damages at the end of the declaration. Such a loss constitutes a substantive fact, which is to be alleged with substantial certainty in order that the defendant may know what the claim is which has to be met.

Knapp *v.* Slocomb, 9 Gray, 73, at p. 75, 1857.
Adams *v.* Barry, 10 Gray, 361, 1858.

Parker *v.* Lowell, 11 Gray, 353, 1858.
Ordway *v.* Colcord, 14 Allen, 59, 1867.

The same rule prevails in other jurisdictions.

Taylor *v.* Town of Monroe, 43 Conn. 36, 1875.
Tomlinson *v.* Town of Derby, 43 Conn. 562, 1876.
Joslin *v.* Grand Rapids Ice Co., 50 Mich. 516, 1883.
Chicago West Div. Ry. Co. *v.* Klauber, 9 Ill. App. 613, 1881.
Wabash Western Ry. Co. *v.* Friedman, 146 Ill. 583, 1892.
Coontz *v.* Mo. Pac. Ry. Co., 115 Mo. 669, 1893.
Slaughter *v.* Met. St. Ry. Co., 116 Mo. 269, 1893.

Under the provisions of

United States Revised Statutes, §§ 721, 914,

"the sufficiency and scope of pleadings, . . . in actions at law, are matters in which the Circuit Courts of the United States are governed by the practice of the courts of the State in which they are held."

Glenn *v.* Sumner, 132 U.S. 152, 1889.

And it is the duty of Circuit Courts of the United States "where the Constitution, treaties, or statutes of the United States" do not interfere, "to observe, as rules of decision, the rules of evidence prescribed by the laws of the States in which such courts are held."

Conn. Life Ins. Co. *v.* Union Trust Co., 112 U.S. 250, at p. 255, 1884.

This is true when the case is begun in the State Court and removed to the United States Court.

West *v.* Smith, 101 U.S. 263, 1879.
Northern Pac. R.R. *v.* Paine, 119 U.S. 561, 1887.

It is also true when the case is begun in the United States Court.

Lewis *v.* Gould, 13 Blatch. 216, 1875.
Taylor *v.* Brigham, 3 Woods, 377, 1876.
Chemung Canal Bank *v.* Lowery, 93 U.S. 72, 1876.
United States *v.* Parker, 120 U.S. 89, 1887.
Robertson *v.* Perkins, 129 U.S. 233, 1889.

It was therefore error in the case at bar to admit the evidence which is the subject of the first, second, and third assignments of error. (Record, pp. 5 to 8.)

II. (E. 1.)

The plaintiff was permitted to testify to what he made a year in the business of running a steam thresher, for five years before the accident. (Record, pp. 5 to 7.) It appeared that during three years out of the five he had partners, and that plaintiff owned the steam thresher. Therefore other elements than the personal services of the plaintiff operated to produce what was made in the business. The partners divided with him, he says. The cost and wear of the steam thresher entered into the computation. Whether the contracts to do threshing were not specially lucrative did not appear. Moreover the amounts fluctuated between twelve hundred dollars and seven hundred and fifty dollars during the five years — a wide fluctuation. Had there been an allegation of special damage in the declaration under which evidence as to the income of the plaintiff would have been admissible, the proper question would have been: "What are the wages a man would receive for doing the work you

personally did?" The question as it was put, "About how much did you make at that?" leaves the jury to conjecture from the answer how much was the wages of the plaintiff, which he would lose because of his injury, and how much was the interest on his capital, or the income arising from the energy and skill of his partners, which he did not lose. It is accordingly well settled that such an inquiry is improper.

Masterton *v.* Village of Mount Vernon, 58 N.Y. 391, 1874.

Heiser *v.* Loomis, 47 Mich. 16, 1881.

Bierbach *v.* The Goodyear Rubber Co., 54 Wis. 208, 1882.

Phyfe *v.* Manhattan Ry. Co., 30 Hun. 377, 1883.

The People's Pass. Ry. Co. *v.* Lauderbach, 4 Penny. (Pa.) 406, 1884.

Marks *v.* Long Island R.R. Co., 14 Daly, 61, 1886.

Johnson *v.* Manhattan Ry. Co., 52 Hun. 111, 1889.

Silsby *v.* Michigan Car. Co., 95 Mich. 204, 1893.

Homan *v.* Franklin Co., 57 N.W. Rep. (Ia.) 703, 1894.

1 Sedgwick on Damages, 8th Ed., p. 262, § 181.

It is stated in the bill of exceptions that "The Court made no ruling that the plaintiff might prove the profits of his business." (Record, p. 8.) No complaint is made by the defendant that any such general ruling was made. But the defendant does rely on its exception to the specific ruling which the Court did make permitting the plaintiff to testify how much he made at running the steam thresher. (Record, p. 6.)

III. (E. 3.)

After the plaintiff had been allowed to testify how much he made a year by running the steam thresher, in order that the jury might guess how much of this was the wages of his personal labor, it appeared (Record, p. 8) that, the fall before the accident, he had sold the good-will and everything connected with his threshing business, except the horses and harnesses with which the machine was moved about. Under these circumstances, in order to reestablish himself in the threshing business before the jury, the plaintiff was allowed to testify that when he sold out he did it with the intention of continuing the business. (Record, p. 8.) That is, having stated what income a certain plant and good-will brought him during five years, and it appearing that he had sold the plant and good-will, he was allowed to state his intention to buy another plant. It by no means follows that his new purchase would have yielded the same returns. The good-will was gone. The decision of this Court in

Richmond & Danville R.R. *v.* Elliott, 149 U.S. 266, 1893.

is much in point. In that case a plaintiff had been permitted to testify at the trial that he thought that he was on the road to promotion at the time of the accident, and to state what his salary would have been had he been promoted. This was held to be error, and the evidence was said to open the door to a speculation of possibilities. In view of the fact that the plaintiff in the case at bar had sold the good-will from which much of the revenue must have come, his testimony of his intention to continue the business, the value of which he had stated to the jury, would seem inadmissible, as opening the door to a speculation of impossibilities. See also

Brown *v.* Cummings, 7 Allen, 507, 1863.

## IV. (E. 4.)

The plaintiff testified that on October 11, 1887, he took a piece of nail from a sore on his knee, and that the nail had been lost. (Record, p. 8.) He also testified that he showed the nail to Mrs. Lahey. (Record, p. 11). She was his sister and kept a boarding-house, where the plaintiff lived after the accident. She testified that she acted as his nurse during his sickness; that about ten months after the accident sores and ulcers had broken out about his knee; that she had not heard his testimony about the nail. There was no evidence that she was a professional nurse or physician. (Record, p. 8.) The size and shape of the nail being in dispute, she was permitted to testify that the plaintiff, after the nail came out of his knee, told her he had taken it out. (Record, pp. 8 and 9.) This was admitted, subject to the exception of the defendant, for the purpose of showing the identity of the nail described by her with the one taken from the plaintiff's leg, and was followed by her description of the nail. (Record, p. 9).

This evidence being purely hearsay, is not admissible, unless it can be brought within some of the exceptions to the rule excluding hearsay evidence. Since a general discussion of the question of the admission of self-serving declarations by the plaintiff is called for under the eighth, ninth, and thirteenth assignments of error, the question of the admission for the general purposes of this case may be considered later in this brief. The plaintiff claims that it is admissible for the special purpose of showing the identity of the nail, and it seems to have been admitted for no other purpose. It cannot be admitted upon that ground unless it was necessary to the identification. But the identification was complete without it. The plaintiff swore that he showed the nail which came out of his knee to Mrs. Lahey. (Record, p. 11.)

It was then proper to ask Mrs. Lahey to describe the nail shown her by the plaintiff, but not to go beyond that and ask her what he said at the time of showing it to her, since that was unnecessary for its identification, and palpably an attempt to buttress the testimony already given by the plaintiff.

Commonwealth *v.* Williams, 105 Mass. 62, 1870.
Atwood *v.* Cornwall, 28 Mich. 336, 1873.
People *v.* Zimmerman, 65 Cal. 307, 1884.

V. (E. 4, 8, 9, and 13.)

The defendant contends that neither the evidence of Mrs. Lahey that the plaintiff told her he had taken the nail out of his knee, nor the evidence of Dr. McCann, the attending physician, that the plaintiff made a like statement to him, nor the evidence of Dr. McCann pointing out the scar of the hole that the plaintiff told him the nail came out of, was competent in this case, on any ground. (Record, pp. 8, 9, 11, and 13.) It is to be noted that Dr. McCann's testimony was not admitted for the purpose of identifying the nail alone, but for all purposes of the trial. No restriction was put upon it. That of Mrs. Lahey was let in for the special purpose of identification.

The evidence of Dr. McCann pointing out the scar of the hole that the plaintiff showed him the nail came out through, is equivalent to testimony that the plaintiff said it came out of the hole.

Whitney *v.* Houghton, 125 Mass. 451, 1878.

All of this evidence was purely hearsay. The plaintiff shows to Mrs. Lahey a piece of a nail, and says, "I took this out of my knee." He shows to Dr. McCann a piece of a nail one morning and says, "I took this out of my knee

last night, and this is the hole from which it came." Unless this evidence comes within some established exception to the rule excluding hearsay, it is inadmissible. It becomes necessary therefore to consider the exceptions to the rule under which the plaintiff may contend that this testimony was competent.

1. It was not competent, whether coming from Mrs. Lahey or from the doctor, for the purpose of identifying the nail, for reasons stated in Division IV. of this brief. And the evidence of the doctor was not competent for this purpose, for the further reason that it was not limited in any way, but was offered and admitted for all purposes, and was therefore inadmissible.

2. When the bodily or mental feelings of a party are to be proved, his exclamations or expressions indicating a present pain or malady are competent evidence. But these statements about the nail are not declarations of a pain or malady, or of a bodily or mental feeling. They are allegations of a fact, and were used as evidence of a fact which could be proved by other evidence, and to which the plaintiff had testified. There was, therefore, no necessity for recourse to his statements made before the trial, after the controversy had arisen, and not upon oath.

It is well settled that the exception to the hearsay rule, allowing declarations of bodily or mental feelings to go in, does not permit statements made out of court of a fact in issue in the case to go in as evidence of the fact.

Chapin *v.* Marlborough, 9 Gray, 244, 1857.
Ill. Cent. R.R. Co. *v.* Sutton, 42 Ill. 438, 1867.
Collins *v.* Waters, 54 Ill. 485, 1870.
Morrissey *v.* Ingham, 111 Mass. 63, 1872.
Hays *v.* The State, 40 Md. 633, 1874.
Roosa *v.* Boston Loan Company, 132 Mass. 439, 1882.

Newman *v.* Dodson, 61 Tex. 91, 1884.
Merkle *v.* Bennington, 58 Mich. 156, 1885.
Dundas *v.* Lansing, 75 Mich. 499, 1889.
Jones *v.* Portland, 88 Mich. 598, 1891.
Rowland *v.* Phila. Wilm. & Balt. R.R. Co. 63 Conn. 415, 1893.

It was proper that the doctor should give his opinion that the ulcers were such as would naturally be caused by the presence of a foreign substance, like a nail, in the knee. But it was improper to permit him to testify that the plaintiff had told him the nail had been there. That had been sworn to by the plaintiff.

Furthermore, it is settled in this court that such declarations must be of present, not of past feelings. "The declarations of the party himself are received to prove his condition, ills, pains, symptoms, whether arising from sickness, or an injury by accident or violence. If made to a medical attendant, they are of more weight than if made to another person. But to whomsoever made, they are competent evidence. Upon these points, the leading writers upon the law of evidence, both in this country and in England, are in accord. There is a limitation of this doctrine that must be carefully observed in its application. Such evidence must not be extended beyond the necessity upon which the rule is founded. It must relate to the present, and not to the past. Anything in the nature of narration must be excluded. It must be confined strictly to such complaints, expressions, and exclamations, as furnish evidence of 'a *present* existing pain or malady.'"

Insurance Company *v.* Moseley, 8 Wall, 397, 1869.

The following decisions are to the same effect:
Narrative to a physician inadmissible:

Gardner Peerage Case, 78, 136, 175, 1828.
Lush *v.* McDaniel, 13 Iredell's Law (N.C), 485, 1852.
Chapin *v.* Marlborough, 9 Gray, 244, 1857.
Emerson *v.* Lowell Gas Lt. Co., 6 Allen, 146, 1863.
Ashland *v.* Marlborough, 99 Mass. 47, 1868.
Hays *v.* The State, 40 Md. 633, 1874
A. T. & S. F. Rld. Co. *v.* Frazier, 27 Kans. 463, 1882.
The People *v.* Murphy, 101 N.Y. 126, 1886.
Lou. N. A. & C. Ry. Co. *v.* Snyder, 117 Ind. 435, 1888.
Lacas *v.* Detroit City Ry., 92 Mich. 412, 1892.
Davidson *v.* Cornell, 132 N.Y. 228, 1892.
Kansas City Ft. S. & M. R. Co. *v.* Stoner 2 C. C. A. 437 (Ark.), 1892.
Rowland *v.* Phil. Wilm. & Balt. R.R. Co., 63 Conn. 415, 1893.

Narrative to persons not physicians inadmissible:

Bacon *v.* Charlton, 7 Cush. 581, 1851.
Towle *v.* Blake, 48 N. H. 92, 1868.
Taylor *v.* Grand Trunk Ry. Co., 48 N.H. 304, 1869.
Johnson *v.* McKee, 27 Mich. 471, 1873.
Elliott *v.* Van Buren, 33 Mich. 49, 1875.
Kelley *v.* Det. L. & N. R. Co., 80 Mich. 237, 1890.
Commonwealth *v.* Leach, 156 Mass. 99, 1892.
Chic. St. L. & P. R. Co. *v.* Spilker, 134 Ind. 380, 1893.

Neither Mrs. Lahey's testimony nor the doctor's, therefore, is admissible as an expression of a bodily or mental feeling.

3. It is evident to any one reading the bill of exceptions in the case at bar that the true purpose of introducing this

evidence was to reinforce and support the testimony of the plaintiff on this point.

"No principle in the law of evidence is better settled than the one enunciated in the rule, that testimony in chief of any kind, tending merely to support the credit of the witness, is not to be heard except in reply to some matter previously given in evidence by the opposite party to impeach it."

United States *v.* Holmes, 1 Cliff. 98, 1858.
Deshon *v.* Merchants' Ins. Co., 11 Met. 199, at p. 209, 1846.
Bryant *v.* Tidgewell, 133 Mass. 86, 1882.

The ordinary method of supporting the credit of a witness under attack is by evidence that his character for truthfulness is good. Proof that he had made statements out of Court to the same effect as his testimony in Court is not admitted even after his credit has been impeached, because against the rule concerning hearsay evidence.

Ellicott *v.* Pearl, 10 Peters, 412, at pp. 438–9, 1836.
Conrad *v.* Griffey, 11 How. 480, 1850.
United States *v.* Holmes, 1 Cliff. 98, 1858.

Only two exceptions to this rule exist:

First, wherever the counsel on the other side imputes to the witness a design to misrepresent, from some motive of interest or relationship, it is proper to show that the witness made a similar statement at a time when the supposed motive or interest did not exist.

Second, when the other side puts in evidence to show that the testimony is a fabrication of recent date, it is proper to show that the same account was given by the witness before its ultimate effect and operation could have been foreseen.

Robb *v.* Hackley, 23 Wend. 50, 1840.
Commonwealth *v.* Jenkins, 10 Gray, 485, 1858.

Reed *v.* Spaulding, 42 N.H. 114, 1860.
Stolp *v.* Blair, 68 Ill. 541, 1873.
Hewitt *v.* Corey, 150 Mass. 445, 1890.

In the case at bar it does not appear that the credit of the plaintiff as a witness had been impeached, and if it had been impeached by accusing him of bias or of having recently fabricated the story, this evidence that he told the same story at a time when his relationship toward the case was identical with that existing when he testified, and also at a time when he must have fully appreciated the importance of such a fact as this of the nail coming from his knee, was clearly not within either of the exceptions above stated.

4. Neither can this evidence come in as part of the *res gestæ*. The declaration was the narration of a past fact, that he had taken the nail from a certain hole in his knee. It was not explanatory of what he was then doing, nor did it accompany the act of taking out the nail. It was essentially a narrative.

Vicksburg & Meridian R.R. *v.* O'Brien, 119 U.S. 99, 1886.
Cummins *v.* Leighton, 9 Bradw. (Ill. App.) 186, 1881.

The material fact to be proved was that the nail which the witnesses were describing was the nail which the plaintiff showed to them. The fact that they testified to that does not make declarations in regard to the past history of the nail competent.

Fiske *v.* Cole, 152 Mass. 335, 1890.

If this evidence is admissible as part of the *res gestæ*, the evidence of the doctor that the corpse he examined was pointed out to him by a bystander as the body of the mur-

dered man, should have been admitted to identify the body, on the same ground in

Hopt *v.* Utah, 110 U.S. 574, at p. 581, 1884.

5. It is therefore submitted that it was error on the part of the presiding judge to permit the plaintiff to support his testimony by proof of his statements out of court, and that the evidence which is the subject of these assignments of error comes within the opinion of this Court in

Allen *v.* Killinger, 8 Wall, 480, 1869,

where Justice Miller says:

"It seems to us that Killinger's statement to Miles Murphy was mere hearsay, made by the plaintiff in his own favor after the controversy had arisen, in the absence of defendants, and its introduction cannot be justified under the settled rules of evidence.

"But if there ever could have been a justification for such testimony there can surely be none now. For the plaintiff is permitted now to tell his own story to the jury directly, but under the sanction of an oath, and subject to the test of cross-examination. Shall he also be permitted to prove what he said to a third party about the same matter when he was under no oath, and in no danger of cross-question or contradiction?"

VI. (E. 12.)

Dr. Cilley was called by the plaintiff as an expert. He had examined the plaintiff on three different occasions to find out what his condition was, but had made no examination with the view of treating him or trying to get him well. (Record, p. 12.)

He was asked, on direct examination: "Did you see, doctor, anything in Dr. McCann's treatment of him, or

what it had been, that you could find objection to?" He answered: "As far as I understood his treatment, I saw nothing to except to, so far as he explained it to me." The defendant excepted to both question and answer. (Record, pp. 12 and 13.)

One of the vital questions in this case was whether the plaintiff had used due care in procuring a suitable surgeon to attend him. There was evidence to the contrary. (Record, p. 5.) The defendant had the right to introduce expert testimony on this point. The presiding judge allowed this question to be put in such a way that it was impossible for the defendant to put on an expert to contradict the testimony. For it does not appear in the question upon what facts the witness is to base an opinion whether the treatment had been objectionable or not. Is he to answer by what he had heard Dr. McCann testify to, or from his own information? An expert witness cannot be asked to give an opinion founded upon his understanding of the evidence.

Dexter *v.* Hall, 15 Wall. 9, at p. 26, 1872.
Sills *v.* Brown, 9 Carr & Payne, 601, 1840.
Woodbury *v.* Obear, 7 Gray, 467, 1856.
Link *v.* Sheldon, 136 N.Y. 1, 1892.
Matter of will of Snelling, 136 N.Y. 515, 1893.
Stoddard *v.* Winchester, 157 Mass. 567, 1893.
Barber's appeal from probate, 63 Conn. 393, 1893.
Mfrs. Acc. Indemn. Co. *v.* Dorgan, 7 C.C.A. 581 (Mich.), 1893.

From the answer of the witness we discover for the first time that he is expressing an opinion based upon his understanding of the treatment so far as Dr. McCann explained it to him.

What was that explanation? Was it true or false, full or garbled? No information on those points is given. It is

essential that all the facts upon which the opinion is given shall be clearly before the jury. They must be stated fully either in the question or in the answer.

Reid *v.* Piedmont & Arlington L. Ins. Co., 58 Mo. 421, at p. 425, 1874.
Muldowney *v.* Ill. Cent. R. Co. 39 Iowa, 615, 1874.
Hitchcock *v.* Burgett, 38 Mich. 501, 1878.
Van Deusen *v.* Newcomer, 40 Mich. 90, at pp. 119–120, 1879.
Polk *v.* The State, 36 Ark. 117, at p. 124, 1880.
Burns, Exr., *v.* Barenfield, 84 Ind. 43, at p. 48, 1882.
Vosburg *v.* Putney, 78 Wis. 84, 1890.
Fuller *v.* Mayor, 92 Mich. 197, 1892.
Stoddard *v.* Winchester, 157 Mass. 567, 1893.

The defendant submits that both question and answer were incompetent because the jury could not know upon what facts the opinion was given, or what the witness understood the treatment to have been, and therefore could not judge what effect or belief should be given to the opinion expressed.

VII. (E. 15.)

The defendant having put in testimony to show that the cause of the accident was the breaking of the journal of an axle, and that it had used the utmost care to prevent a break, the plaintiff, in rebuttal, called an expert, and was allowed to ask him, "What, leaving out collisions, is the most fruitful cause of railroad accidents?" To this the defendant excepted. The witness answered, "The breakage of axles." (Record, p. 15.)

Higgins *v.* Dewey, 107 Mass. 494, 1871,

is a case where a similar question is dealt with, and decided upon grounds which, the defendant submits, are decisive in favor of its contention here. That was an action of tort for negligently setting and guarding a fire on brush land. The defendant offered to prove by one Wells, a surveyor and civil engineer of many years' experience in clearing land by fire, who had observed the effect of wind on fires, and was acquainted with the land in question, and the surrounding country, and there was no probability that a fire set under the circumstances of the case would be communicated to the plaintiff's land. This evidence was excluded, and the question came up on exception.

The Court, speaking by Justice Gray, disposes of the matter in these words: "The testimony of Wells was rightly excluded, because it related to an immaterial question, and to a subject within the common knowledge of the jury."

The testimony of Meigs was immaterial. That it had no bearing on the care used by the plaintiff will be conceded. It was not limited to passenger trains, or to the kind of equipment used by the defendant. From the fact that most railroad accidents, aside from collisions, are caused by broken axles, no inference can be drawn that this did not arise from some other cause, and therefore this evidence had no probative force as to the cause of the accident, and was not admissible on that issue.

Maguire *v.* Middlesex R.R. Co. 115 Mass. 239, 1874.

Lewis *v.* Brooklyn El. R. Co. 27 N. Y. Supplement, 889, 1894.

There can be no doubt that toward the plaintiff, a passenger upon its train, the defendant owed the highest possible degree of care, and indeed it attempted to show that it had used the utmost care, so that the degree of care required

could not be increased by any evidence, after the relationship of the parties had been established. It is too clear to require the citation of authorities that the plaintiff was entitled to compensation for his injuries, and nothing more.

Pennsylvania Co. *v.* Roy, 102 U. S. 451, 1880.

The amount of damages could not be legitimately enhanced by such evidence as this. So that the evidence was immaterial.

Furthermore, the subject was not one for expert testimony. Any newspaper reporter who had been in the habit of reporting railroad accidents would have known as much on this question as the witness. Every juryman who reads the newspapers has the same information. It depends in no degree upon scientific knowledge or special skill. It was, therefore, to be determined, if material, by the common knowledge of the jury, and expert opinion on it was incompetent.

White *v.* Ballou, 8 Allen, 408, 1864.

Lyman *v.* State Mut. F. Ins. Co. 14 Allen, 329, 1867.

Luce *v.* Dorchester Ins. Co. 105 Mass. 297, 1870.

## VIII.

Because of these errors in the conduct of the trial the defendant, as plaintiff in error, asks that a new trial be ordered.

SAMUEL HOAR,
*Counsel for Plaintiff in Error.*

[redacted]

[redacted]

THE BOSTON & ALBANY RAILROAD [redacted]

[redacted]

PATRICK J. O'REILLY

[redacted]

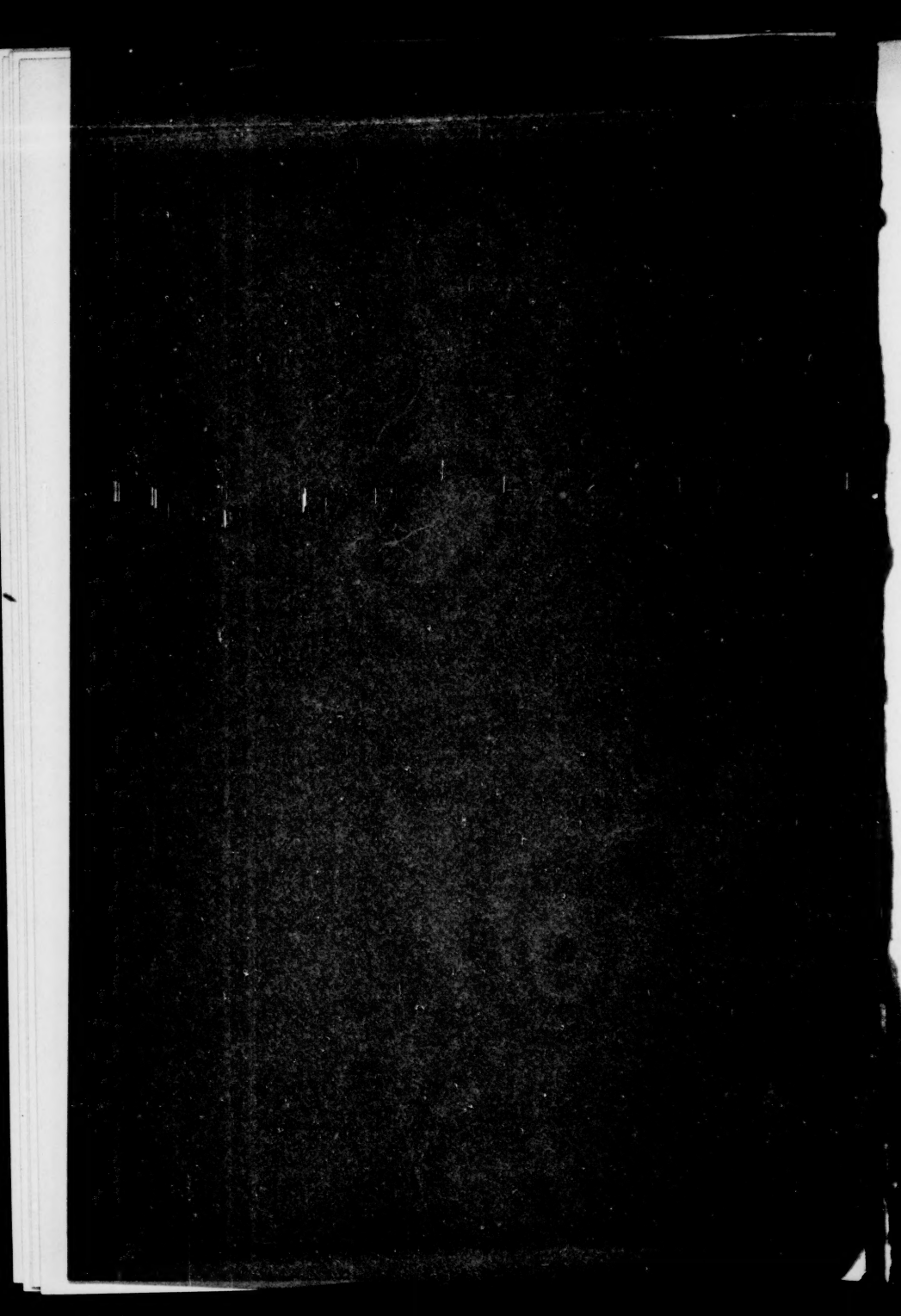
SUPPLEMENTAL BRIEF OF [redacted]

[redacted]

SAMUEL HOAR,
[redacted]

[redacted]

BOSTON:
Press of Rockwell & [redacted]
1874.



# Supreme Court of the United States.

OCTOBER TERM, 1894. No. 197.

THE BOSTON & ALBANY RAILROAD COMPANY,
PLAINTIFF IN ERROR,

*vs.*

PATRICK J. O'REILLY.

## *SUPPLEMENTARY BRIEF OF THE PLAINTIFF IN ERROR IN REPLY.*

I. (E. 1, 2, and 3.)

The first point made by the plaintiff in error in its brief is that "in the United States Court for the District of Massachusetts it is error to permit the plaintiff to prove how much he earned or how much he made in business before the accident, unless it is alleged in his declaration that he claimed special damage by loss of his earnings or injury to his business."

The answer of the defendant in error to this point is by way of confession and avoidance. He does not question that the law is in Massachusetts as is stated, nor that this law must govern the Circuit Court of the United States upon this point; but he suggests that it was the duty of the counsel for the plaintiff in error at the trial to state specifically the reason for his objections, and if he failed to do so, the exception *cannot* be considered by this Court. And further, that since counsel at the trial gave a specific reason for the objection to some of the questions, he cannot be heard in this Court to allege other reasons. A number of cases are cited by the defendant in error as supporting this contention, which cases fall under different

principles. One of these will appear by considering that part of the opinion of Mr. Justice Daniels in

Camden *vs.* Doremus, 3 Howard, 515,

which is replaced by asterisks in the brief of the defendant in error. It is as follows: "After each deposition offered in evidence by the plaintiffs to the jury, it is stated, that to the reading of such deposition the defendant, by his counsel, objected, and that his objection was overruled. A similar statement is made with regard to the record of the suit instituted in the court of Hinds County against Calhoun, the maker of the note, and offered in this cause as proof of due diligence."

The Court were there dealing with an exception to a mass of evidence which did not point out any special questions or answers as the object of the exception. This is true also in the case of

Harvey *vs.* Tyler, 2 Wallace, 328,

where the exceptions were directed to a series of instructions without indicating any particular one of the series, forty-six instructions being covered by three exceptions.

Another line of decisions cited by the defendant in error consists of those which hold that an exception taken to one point of law will not raise another. Thus in

Hinde's, Lessee, *vs.* Longworth, 11 Wheaton, 199,

it was objected below to the introduction of a record that the judgments were *inter alios*, the party to the suit not being party to the record, and in the upper court it was urged that this class of evidence was not admissible as a matter of law to impeach a deed for fraud, a wholly different aspect of the case.

Burton *vs* Driggs, 20 Wallace, 125,

contains a dictum resting on the same principle, although refining the principle to an extreme degree, since it seems in that case that had the defendant objected on the ground that the copy was not *an* original instead of *the* original, the exception could not have been criticised.

Gould *vs.* Day, 94 U.S. 405,

simply holds that under an exception to a question you cannot raise the impropriety of the answer.

Wood *vs.* Weimar, 104 U.S. 786,

decides that an objection to the admission of a deed on the ground that it is incompetent, immaterial, and irrevelant, does not raise the question of the correctness of the attestation of the copy offered.

Stebbins *vs.* Duncan, 108 U.S. 32,

holds that where the objection to proof of a lost deposition by copy omits one of certain grounds, all of which jointly were necessary to make up the objection, it was faulty.

In Burley *vs.* The German American Bank, 111 U.S. 216,

the objection argued on appeal was that the testimony on cross-examination of the witness was not responsive to anything on the direct examination. No objection was taken at the trial on that ground. If it had been, it would have been largely within the discretion of the presiding judge, but the opinion of Mr. Justice Blatchford contains this contribution to the case at bar. He says "the objection taken was that the testimony was irrelevant, *meaning that it was not admissible under the answer.*"

Noonan *vs.* Caledonia Mining Co., 121 U.S. 393,

is another case where an objection was made to the admission of articles of incorporation on the ground that they were immaterial, irrelevant and incompetent, and the objection sought to be made on appeal was that they were not sufficiently authenticated.

Patrick *vs.* Graham, 132 U.S. 627,

while the head-note contains the remarks cited in the brief of the defendant in error, is decided on the ground that the charge of the Court to the jury shows that the objectionable testimony was stricken out on further objection, and the jury told to disregard it. In

Dist. of Columbia *vs.* Woodbury, 136 U.S. 450,

the evidence objected to was held admissible and the exception overruled on other grounds than the form of the objection, and this is true of all cases cited by the defendant in error from the decisions of this Court. The Court criticises the form in which the question is presented, but invariably considers it, and decides it upon general grounds.

Of the cases cited from the different circuits, only one case is from the Massachusetts District. As was stated by the counsel for the plaintiff at the trial, the practice in different circuits on this point is different. Only three of the cases cited, namely:

Charleston Ice Mfg. Co. 4 C.C.A. 368;
United States *vs.* Shapleigh, 4 C.C.A. 237;
Tabor *vs.* Commercial National Bank, 10 C.C.A. 429,

go to the extent of refusing to hear the excepting party because of the form of the exception. These cases were in the districts of South Carolina, Missouri, and Colorado respectively. The case of

King *vs.* The McLean Asylum, 64 Federal Reporter, 331,

which was a case from the Massachusetts District, and added to the brief of the defendant in error after filing, although it cites the case of Charleston Mfg. Co. *vs.* Joyce, rests on wholly different ground, to wit, that it does not appear that there was any offer or admission of any evidence whatever, but so far as appears, the appeal was taken on the record, and no exceptions were saved. The Joyce case is cited for the general rule "that the appellate court will only permit those matters to be assigned for error that were brought to the attention of the court below during the progress of the trial, and then passed upon."

It is desirable to note precisely what took place between the Court and counsel in the case at bar as to these three exceptions. (Record, pp. 6, 7, and 8.)

"*Q.* You worked at about all of it. About how much did you earn a year by that?

"Mr. STROUT. — I object, your Honor.

"The COURT. — Admitted.

"Mr. STROUT. — I take an exception.

"Gen. BUTLER. — I suppose, may it please your Honor, this is the ground to put it upon: what has he lost?

"The COURT. — I admit the question. Let the stenographer note the exception.

. . . . . .

"*Q.* Well, sir, look it all over and take it the four years, take it the five years, and how much did you average a year income from your labor?

"Mr. STROUT. — That is also subject to my objection.

"The COURT. — I admit it.

"Mr. STROUT. — And your Honor will save my exception.

. . . . . .

"Mr. STROUT. — Is it necessary for me to state the reasons of my —

"The COURT. — Not unless the Court requests it, unless there is some special thing you desire to speak on.

"Mr. STROUT. — I find that the practice varies in the different circuits in relation to that. In the trial of a civil cause here, *while I desire to save all rights*, I do not want to take any more time than is necessary. I will state my reasons if that is necessary in order to save my exceptions.

"The COURT. — I do not think it is necessary.

"By Gen. BUTLER. — Give the jury your best —

"The COURT. — It might very well happen that testimony might be admissible for some *purposes* and not for others. In that case I suppose it might be necessary for you to state on what grounds you except.

"Mr. STROUT. — Well, the first exception that I took was upon the ground that it was not competent to put in the profits of the business, because that depends upon so many outside matters that it is too remote.

"The COURT. — Yes, I ruled upon that.

. . . . . .

"*Q.* When you sold out, you did it with the intention of continuing the business?

"Mr. STROUT. — That I object to.

"The COURT. — That I admit.

"Mr. STROUT. — That is subject to my exception.

"The COURT. — Your exception will be noted."

The situation, as the plaintiff in error understands it, is that counsel at the trial objected to those questions, and asked the Court what practice, — the practice being different in different circuits, — should be observed in this case as to stating reasons for an exception.

The Court, which had been ruling with great peremptoriness, stated that unless it requested, it was not necessary to state the reasons, and then said that it might happen that testimony might be admissible for one purpose and not for another, and in that case it might be necessary that the ground should be stated.

This statement of the Court should not be extended beyond its fair meaning. It only applies to cases where the testimony would be admissible for some purposes, and not for others. It does not apply to cases where the counsel object to the evidence as admissible on no ground whatsoever. In those cases, under the express direction of the Court to the counsel at the trial, by which the Court certainly waived any rights it had to a statement of specific reasons, by peremptorily overruling the objections of counsel without giving them an opportunity to be heard, a general objection to the admission of evidence, followed by an exception, must prevail, unless, on some ground, the evidence is admissible. It is submitted that this Court has never driven an excepting party from the Court without a hearing on the merits of his exceptions, by relying solely on the ground that as a matter of form they were defective. The cases cited by the defendant in error, no doubt after a thorough investigation of the law on this point, show this, and no case is produced to the contrary.

Whether or not it is a matter of criticism that the reasons were not stated under the circumstances of this case, justice requires that the exceptions should be considered fairly on their merits, without any technical objection.

It is not necessary for the trial Court to pass upon the objection directly in order that the exception may be valid. The Court may

either waive the right to be informed, and it may waive this by its conduct, or express direction, or it may pass upon the objection indirectly, or by reasonable construction.

The presiding judge at the trial had heard the declaration read. He was trying a case upon that declaration, and upon no other. The purpose of the declaration, if it has any, is to set forth the case which the plaintiff intends to try, and as has already been quoted from Mr. Justice Blatchford, an objection that testimony is irrelevant, means that it was not admissible under the pleadings. The issue before the Court is determined by the declaration and answer, and it is noticeable that neither the writ nor declaration contained any statement of the plaintiff's employment or business.

As to the claim that the plaintiff in error has no right to assert now an objection more general than one which he did specifically assert at the trial, there are two answers. *First*, that it is not fair to bind him by a statement made after he had been lulled into security by the order of the Court that he was not required to state his reasons, since such a statement must have been made with less care and precision than otherwise, and should not then or now be held to include *all* his reasons. And, *second*, that although somewhat general in its terms, the statement that this evidence was not competent because it depended upon outside matters and was too remote (Record, pp. 7, 8), must be held to refer not only to the general proposition that profits of business as a rule of evidence are remote from the question of injury to a particular partner in that business, but also that upon the pleadings in the case which the Court knew and was familiar with, such an inquiry was outside of and remote from the issue. The plaintiff in error relies upon this construction of that objection, and contends that it now has a right to insist upon all the exceptions contended for in its brief upon the first three assignments of error.

If, as is stated at page 5 of the brief of the defendant in error, the presiding judge, in justification, was obliged to put into the record the statement that he made no ruling that the plaintiff might prove the profits of the business, it becomes a question

for this Court how far they will allow a party to be deprived of his exception when the precise wording of the question and exception, and the conversation with the Court at the time it was taken, appear on the record, together with a statement by the presiding judge that he did not make the ruling he did make. The plaintiff in error understands the statement differently. It does not understand that the presiding judge intended to deny that he made the ruling, but simply that he intended to state that he made no general ruling that the profits of the business should come in, but only ruled upon each question as it came up.

The defendant in error further contends that the objection to the sufficiency of the allegations of the complaint must be held to have been waived. No objection is made to the sufficiency of the allegations. The objection is that improper evidence was admitted under them. The plaintiff chose the issues and not the defendant, and it is the defendant's right to have the testimony confined to those issues. The cases of

The Vaughan and Telegraph, 14 Wallace, 258,

cited to this point, decided that where exceptions to libels were taken in a District Court, and an appeal taken in each case to the Circuit Court, which was wholly silent as to these questions, and a further appeal to this Court, also silent as to the exceptions, they must be held to be waived, with which conclusion the plaintiff in error need not quarrel. The case of

Roberts *vs.* Graham, 6 Wallace, 578,

quoted from at length on page 9 of the brief of the defendant in error, contains this clause, which should be inserted in that quotation in place of the asterisks, as a part of the portion omitted: "It does not appear that the defendant objected to the admission of the testimony, that he moved to have it ruled out, or that he made any allusion to the subject until he asked the Court at the close of the argument, to instruct the jury as shown by the bill of exceptions." This would seem quite different from the case at bar. This case and the case of

Denver and Rio Grande Ry. *vs.* Harris, 122 U.S., 597,

seem also to be cited by the defendant in error on the question what evidence may be admitted in the absence of an allegation of special damage, but this is not pertinent to this inquiry because the plaintiff in error relies on the law of Massachusetts as binding in this case. The same observation applies to the cases cited on page 14 of the brief of the defendant in error.

The statement on page 10 of the brief of the defendant in error that each of the exceptions relied on by the plaintiff in error is open to objections presented by the authorities formerly cited, although not a very specific statement, will be noticed under the other exceptions and there dealt with.

II. (E. 1.)

The plaintiff in error contends, in addition to the objections heretofore stated under the first assignment of error, that it was error to admit the testimony of what the plaintiff made a year in the business of running a steam-thresher, under the line of decisions which hold that such evidence depends on too many contingencies to be admitted, even if an allegation of special damage was in the declaration.

The cases cited by the plaintiff in error establish a rule of prohibition. They say that in cases where it is proper to show the amount the plaintiff individually earned, and to show his occupation and earnings, it is not proper to show the profits of a business which depended only in part on his personal exertion, and in part on other elements, such as interest on capital, the exertion of other partners, or the like. No case cited by the defendant in error conflicts with this line of decisions, although counsel have been sometimes misled by the head notes in their citations. It is not worth while to go through with these cases one by one, but it is sufficient to say that in no one of them is evidence of the profits of business admitted. In each case the distinction is observed that it is the earnings of the individual that should go in, and in one or two of the cases that distinction is particularly mentioned.

The defendant in error in his brief, pp. 12 and 13, does not

recognize the distinction between the results of the business of a man, and what he gains from his earnings in occupations which depend on his own exertions, — such, for example, as common laborer, midwife, architect, doctor, etc., — nor the difference between exertions purely personal and those accompanied by the use of capital, machinery, good-will, or partners.

One or two of the cases cited are cases of actions brought by executors to recover damage caused to the widow, or next of kin, by the death of their decedent, and this fact alone would set those decisions on a different footing.

III. (E. 3.)

Under this heading the defendant in error again sets up an affirmative defence, to wit, that the plaintiff in error was not prejudiced by the answer of the plaintiff that he sold out with the intention of continuing the business, and cites from

Simonson *vs.* The C.R.I. & P.R.Co. 49 Iowa, 87,

the following on page 91 of the opinion: "Again, if a man is killed whose earnings have been large, but who has retired from business, with no intention of resuming, it is not certain that he is injured in reference to his prospective estate. Yet, because he might resume, a jury would not be justified, where a cause of action existed for the injury, in allowing nothing for the injury sustained by the decedent in reference to his prospective estate."

This case is not an authority for the contention of the defendant in error, for it should be noted that in it the evidence was that the plaintiff at the time of the injury was earning one dollar and a half a day as a laborer. And further, that the jury were not told to find for the plaintiff on the basis of his past earnings, when his business was given up. That is what was done in the case at bar by the admission of this answer. The case was allowed to go to the jury on the plaintiff's answer, to a leading question, that he intended to pursue the same business, and it is impossible to assume that the size of the jury's verdict was not caused in part, by

the belief that the plaintiff would have gone on making the profits testified to had he not been prevented by this accident.

IV. (E. 4.)

The plaintiff in error does not dispute that hearsay evidence may be admitted for the purpose of identification of a time, place, or thing. Its contention is that this exception to the rule against the admission of hearsay evidence does not extend beyond the necessity of the case. The statement of the plaintiff was not necessary to identify the nail, and cases are cited to that point. The cases cited by the defendant in error do not conflict with this contention. The only one which requires notice is that of

Pringle *vs.* C. R. I. & P. Ry. Co. 64 Iowa, 613.

That case seems singularly like the case at bar, but it differs in one essential particular. The evidence there was competent as part of the *res gestæ*, for it is specially stated in the opinion that the plaintiff *at the time* called the nurse to him and showed her a piece of bone which he declared he had *just* taken from the wound.

The exception to this testimony is taken in a way to give the Court full notice of the grounds. (Record pp. 8 and 9).

"*A.* — The sore used to bother him and he would take the poultices off his knee, and I told him not to take the poultices off. But he did n't show me the sore at the time, but he told me he had taken the nail out of his knee.

"Mr. STROUT. — That is improper.

"The COURT. — I do not understand that it is contended that she saw the nail come out, but that her brother told her about it.

"Mr. STROUT. — Can it be possible that what her brother told her is evidence here in this court?

"The COURT. — I suppose it is admissible, followed up by her description of the nail — what it was.

"Mr. STROUT. — I object to the question, and take an exception.

"The COURT. — That you can do.

"Mr. STROUT. — This conversation with her brother is manifestly, it seems to me, incompetent.

"The COURT. — I must judge, not you, of the competency of it; I rule it in."

V. (E. 4, 8, 9, and 13.)

In discussing these assignments of error the plaintiff in error was obliged to deal with all possible aspects in which the case might present itself. These are now reduced to two by the position taken by the defendant in error. He says "There are two grounds upon which the admissibility of this evidence is sustained: (1) to identify the nail seen by the physician as the one which the plaintiff says came out of the sore; (2) upon the more general ground that such a statement to a physician is admissible, when made in the course of his attendance to effect a cure of the injury."

The question of admission for purposes of identification has been already dealt with. As to the other ground for admission, the plaintiff in error submits that the case is determined by the statement made in

Insurance Co. *vs.* Moseley, 8 Wallace, 397,

by this Court after careful consideration, and quoted on page 14 of the brief of the plaintiff in error.

This case is reinforced by many authorities cited in the brief of the plaintiff in error. Of the cases cited by the defendant in error it is to be said that no one of them is a decision that a declaration of a past sensation can come in, although some of the Massachusetts cases and of the Indiana cases seem to contain dicta to that effect. The case in the 64th of Iowa clearly rests on a different ground.

. . . . . .

Moreover, this exception to the hearsay rule in favor of declarations of present bodily or mental feelings does not go so far as to let in declarations as to a fact in issue in the case. That is a rule of prohibition which applies even though the evidence be admissible on the other ground, and the defendant in error fails to meet in any way this contention.

It is true that in the case of three of these assignments of error no special reason is assigned for an objection. Here, again, the statement of the Court made earlier in the case, that no such reasons were desired, had its effect, as may be seen in the short statement of the conversation between the Court and counsel as to the thirteenth assignment of error. (Record, p. 13.)

"*Q.* Where is the scar of the hole that your patient showed you it came out through?

"Mr. STROUT. — I object to that.

"The COURT. — That I admit.

"Mr. STROUT. — I take an exception."

It is, however, somewhat difficult to see how any Court could require enlightenment or an extended statement of reasons on such an exception as this.

VI. (E. 12.)

The defendant in error answers the contention in favor of this exception not by citing cases conflicting with those cited by the plaintiff in error, but by another answer, by way of confession and avoidance, of the same nature as the one made in the earlier part of his brief, to wit: that it was the duty of the counsel to move to have that part of the answer which was objectionable stricken out. What took place was this: (Record, pp. 12 and 13.)

"*Q.* Did you see, doctor, anything in Dr. McCann's treatment of him, *or what it had been*, that you could find objection to?

"Mr. STROUT. — I object to the question.

"The COURT. — I think it is competent. I do not see any objection to it.

"Mr. STROUT. — I object to it because it is not competent to ask in a general way what he has asked. However, if your honor will allow me an exception to the question —

"The COURT. — Yes, sir.

"Mr. BUTLER. — You may answer the question.

"*A.* As far as I understood his treatment, I saw nothing to except to, *so far as he explained it to me.*

"Mr. STROUT. — I object to the answer also.

"The COURT. — Well, the answer is admitted, and the exception is allowed."

The precise objection was stated to the Court that such a general question was improper, and no doubt a specific objection would have been made to the answer had not the Court taken the words out of the counsel's mouth by admitting the answer and allowing an exception to it. It cannot be necessary, in order to secure consideration of the exception from this Court, to move to have an answer stricken out when the trial Court has peremptorily and emphatically overruled any objection to it.

Furthermore, Dr. Cilley was not limited, as is erroneously supposed by counsel for defendant in error who did not try the case below, to what he *saw* of the treatment by Dr. McCann. He was also asked to consider what that treatment *had been* as narrated to him either by the patient or by the doctor, and he shows by his answer that it is based on the narration of Dr. McCann.

VII. (E. 15.)

Here, again, the defendant in error invokes, by way of confession and avoidance, the rule that it must appear that the excepting party is injured by the ruling against him below, and contends that the evidence put in by Meigs assisted in sustaining one branch of the defence below. It is true that the defendant below contended, as the plaintiff claimed in his declaration, that the accident was caused by the breaking of a journal of an axle near the wheel, but the poison concealed in this evidence was that it tended to convince the jury that this was the most common thing in the world to happen, and therefore to induce them to hold the railroad company to an extreme and unnecessary degree of care, and perhaps to increase the damages they awarded.

Under this head, again, it is desirable to complete the quotation of the defendant in error from Mr. Justice Miller's opinion in

Deery *vs.* Cray, 5 Wallace, 795.

This is the quotation in full: "We concede that it is a sound principle that no judgment should be reversed in a court of error

when the error complained of works no injury to the party against whom the ruling was made. But whenever the application of this rule is sought, it must appear so clear as to be beyond doubt that the error did not and cannot have prejudiced the party's rights. In the case before us this is not so clear." Upon this statement, when fully quoted, the plaintiff is entirely contented to stand.

Respectfully submitted,

SAMUEL HOAR.

MAR 14 1895
JAMES H. McKENNEY
CLERK

# Supreme Court of the United States.

OCTOBER TERM. 1894.

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No. 197.

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THE BOSTON & ALBANY RAILROAD,
*Plaintiff in Error,*

*v.*

PATRICK O'REILLY.

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# BRIEF FOR DEFENDANT.

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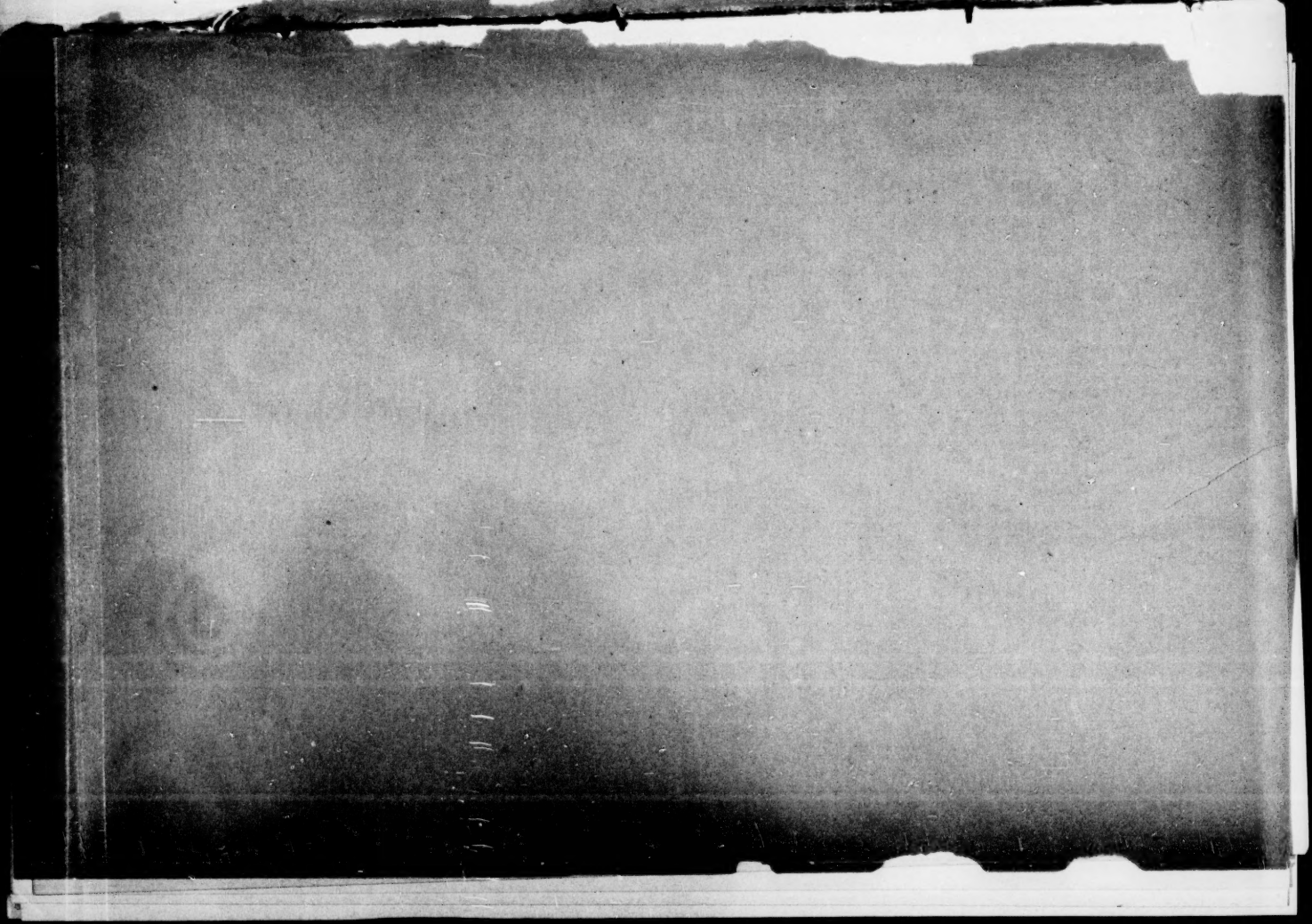

# Supreme Court of the United States.

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*Plaintiff in Error,*

*v.*

PATRICK J. O'REILY.

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## BRIEF FOR DEFENDANT.

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THIS IS A WRIT OF ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

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### STATEMENT OF FACTS.

September 27, 1889, Patrick J. O'Reilly, the defendant in error, brought suit against the Boston & Albany Railroad Company, the plaintiff in error, in the Circuit Court of the United States for the District of Massachusetts, to recover damages for personal injuries received by him on the 4th day of January, 1887, caused by a defect in an axle of the engine tender of the train in which he was riding as a passenger, and also by the defective condition of the track and switch near the place of the accident. The verdict was for

the original plaintiff. The Boston & Albany Railroad Company filed its bill of exceptions to the ruling of the presiding judge upon certain questions of evidence, and seasonably sued out a writ of error to this Court. The assignment of errors is found on page 16 of the Transcript of Record. The contentions of the parties upon the several issues raised at the trial are set forth on page 5 of the Transcript of Record. The plaintiff, O'Reilly, was a passenger for hire upon the defendant's train. At the time of the accident the train was running east upon an almost straight line through West Springfield, Massachusetts. According to the testimony introduced by the defendant, the rate of speed of the train was about thirty miles an hour. The plaintiff's evidence tended to show that the rate was still greater. The plaintiff offered evidence tending to show that the cause of the accident was a switch defectively placed and the excessive rate of speed. The defendant's evidence tended to show that as the train approached the scene of the accident a journal under the engine tender broke, and that this was the cause of the accident. The defendant offerred evidence tending to show that it had used the utmost caution and highest care in the equipping of its train. The plaintiff offered evidence to the contrary. The plaintiff offered evidence to show that he had received injuries causing heart trouble, lung difficulty and trouble with his urine, which were permanent injuries; also a large number of cuts and bruises, which healed over after the accident, and further injury near his left knee, from which he had not recovered, and that his knee had become permanently stiff. The defendant admitted that the plaintiff had received injuries at the time of the accident, and offered to show that he had fully recovered from all his injuries, except the injury to his left leg. There was conflicting testimony in regard to the permanency of the last-named injury. There

was a controversy as to whether the plaintift had used due care in procuring a suitable surgeon to attend him after the accident. Each party offered evidence in support of his contention in this regard.

## POINTS AND AUTHORITIES.

I (E. 1, 2 AND 3).

The three alleged errors are as follows:

1.

That the Court, against seasonable objection and exception, permitted the plaintiff, O'Reilley, to testify that in the business in which he was engaged three or four months each year prior to the accident (but which, including good-will and everything connected with the business he had sold before the accident), he had made, "the first year he run the business twelve hundred dollars clear of all expenses; the second year, nine hundred dollars; the third year, one thousand dollars, and the last year seven hundred and fifty dollars."

2.

That the Court, against seasonable objection and exception, permitted the plaintiff, O'Reilly, to testify that he estimated he fairly made, by his own individual exertions, one thousand dollars per year.

3.

That the Court, against seasonable objection and exception, permitted the plaintiff, O'Reilly, after testifying that he had sold all the business, good-will and everything connected with the business, to answer in the affirmative the following question, asked by his attorney: "When you sold out, you did it with the intention of continuing the business?"

It is now contended by the plaintiff in error that "In the United States Court for the District of Massachusetts it is error to permit the plaintiff to prove how much he earned or how much he made in business before the accident, unless it is alleged in his declaration that he claims special damage by loss of his earnings or injury to his business."

We call the attention of the Court to the objections of counsel, who tried the case in the Circuit Court, as disclosed by the record.

The testimony upon which the first two of these errors is based is found on page 6 of the Record.

The objections are general, no reasons being given. At this point a colloquy took place between the presiding judge and the counsel for the defendant as to the necessity in that jurisdiction of stating the reasons for an objection. (Record, p. 7.)

Counsel for defendant desired to know if it was necessary to state his reasons for his objections. The Court answered: "Not unless the Court requests it, unless there is some special thing you desire to speak on." On the counsel again stating his willingness to give his reasons, the Court said: "I do not think it is necessary."

Before the next question was asked the Court said: "It might very well happen that the testimony might be admissible for some purpose and not for others. In that case I suppose it might be necessary for you to state upon what grounds you except." Thereupon Mr. Strout, defendant's counsel, said: "Well, the first exception that I took was upon the ground that it was not competent to put in the profits of the business, because that depended upon so many outside matters that it is too remote."

Before the question was answered, defendant's counsel again objected generally and the Court said: "I ruled that in, and your exception, I understand, has been taken and noted."

At the bottom of Record, page 7, is found the following:

"To the ruling of the Court admitting this testimony the defendant excepted and objected that it was not competent to put in the profits of the business, because that would depend upon so many outside matters and was too remote."

The claim made in this statement of the objection was so remote from the fact that the Court, in justification, was obliged to put into the Record the statement found near top of Record, page 8, that "*The Court made no ruling that the plaintiff might prove the profits of his business.*"

The defendant's exception as to the continuance of the business is naked as to reasons for the objection.

This *résumé* shows that with respect to these three alleged errors, either *no reason* for the objection was given, or *one which the Record says is untrue, because no such ruling was made.*

Plaintiff in error, by counsel, who did not try the case below, assigns reasons for objections to the admissibility of the testimony which were *not made at the trial* and totally disregards those specifically but *not correctly claimed by the counsel who did try the case.*

*a.*

It was the duty of the counsel for the plaintiff in error at the trial, to state specifically the reasons for his objections, and if he failed so to do, the exception cannot be considered by this Court.

*b.*

Since it appears by the record that counsel at the trial to some of the questions gave a specific reason for the objection, the plaintiff in error cannot in this Court be permitted to be heard to disregard such specific reasons and allege new and inconsistent ones.

In Camden *v.* Doremus, 3 How., 515, this Court, by Mr. Justice Daniels said:

"Before entering upon an examination of this agreement and of the questions which it has given rise to, it is proper to dispose of an objection by the defendant in the court below, which seems to have been aimed at the entire testimony adduced by the plaintiffs, but whether at its competency, or relevancy, or at its regularity merely, that objection nowhere discloses. * * * With regard to the manner and the import of this objection, we would remark that they were of a kind that should not have been tolerated in the court below pending the trial of the issue before the jury. Upon the offer of testimony, oral or written, extended and complicated as it may often prove, it could not be expected, upon the mere suggestion of an exception which did not obviously cover the competency of the evidence nor point to some definite or specific defect in its character, that the court should explore the entire mass for the ascertainment of defects which the objector himself either would not or could not point to their view. It *would be more extraordinary still if, under the mask of such an objection, or mere hint at objection, a party should be permitted in an appellate court to spring upon his adversary defects which it did not appear he ever relied on, and which, if they had been openly and specifically alleged, might have been easily cured.* 'Tis impossible that this court can determine, or do more than conjecture, as the objection is stated on this record, whether it applied to form or substance; or how far, in the view of it presented to the court below, if any particular view was so presented, the Court may have been warranted in overruling it. We must consider objections of this character as vague and nugatory, and as, if entitled to weight anywhere, certainly as without weight before an appellate court."

Hinde's Lessee *v.* Longworth, 11 Wheaton, 199.
Harvey *v.* Taylor, 2 Wall., 328.
Burton *v.* Driggs, 20 Wall., 125.

"The rule is universal that nothing which occurred in the progress of the trial can be arraigned for error, unless it

*was brought to the attention of the Court below and passed upon* directly or indirectly."

Gould *v.* Day, 94 U. S., 405.
Wood *v.* Weimer, 104 U. S., 786–795.
Stebbins *v.* Duncan, 108 U. S., 32.
Burley, Receiver, *v.* Germania American Bank, 111 U. S., 216.
Noonan *v.* Caledonia Mining Co., 121 U. S., 393.

In Patrick *v.* Graham, 132 U. S., 627, it was held that—

" Where a case has gone to a hearing, testimony been admitted to a jury under objection, but without stating any reasons for the objection, and a verdict rendered with judgment on the verdict, *the losing party cannot in the appelate court state for the first time a reason for that objection which* would make it good."

District of Columbia *v.* Woodbury, 136 U. S., 450-462.

The same rule is held in the Circuit Court of Appeals.

Northern Pac. R. Co. *v.* Charlees, 2 C. C. A., 562; 51 Fed. Rep., 389;
Charleston Ice Manufacturing Co. *v.* Joyce, 4 C. C. A., 368; 54 Fed. Rep., 332;
United States *v.* Shapleigh, 4 C. C. A., 237–249; 54 Fed. Rep., 126;
Ward *v.* Blake Manfg. Co., 5 C. C. A., 538–542; 56 Fed. Rep. 437.

The St. Louis S. W. Ry. Co. *v.* Henson, 7 C. C. A. 349; 58 Fed. Rep. 531, presents a strong case against the position of the plaintiff in error. One of the assignments was " that the Court erred in permitting any testimony to be introduced under the complaint and answer in the case." Caldwell Circuit Judge delivered the opinion of the Court

King v McLean Asylum of Massachusetts General Hospital (C.C.A.) 64 F. 331.

having no legal capacity to sue, the objections to the testimony of each of the witnesses offered at the proper time by the plaintiff in error should have been sustained, and no such evidence was legal under the complaint.' But no such objection to the admission of the testimony was made in the lower court. The bill of exceptions states that 'the plaintiff, to maintain the issue on his part against the objection of the defendant, then and there made to the testimony of each witness at the time made, and which objection the court overruled and to which ruling the defendant at the time excepted.' And the language of the assignment of errors is 'that the Court erred in permitting the witness O. J. Storm to testify before the jury and admitting his testimony as evidence in this case against the objection of the defendant.' This assignment is repeated in the same language as to every witness called by the plaintiff. A further assignment of error is 'that the court erred in permitting any testimony to be introduced under the complaint and answer in this case.' It will be observed that the grounds of the objection to the introduction of the testimony are not stated either in the bill of exceptions or assignment of errors. The objection that the plaintiff cannot maintain an action in his own name for the negligent killing of his wife is made for the first time in this Court. It might have been raised in the lower court by a demurrer to the complaint, or by an objection to the introduction of the testimony, or by request for an instruction, but it was not raised in any of these modes and was not raised at all. The plaintiff in error offered eight requests for instructions, not one of which questioned, and every one of which by implication conceded the right of the husband to bring the suit and rested the defense to the action on other grounds. It is the province of an appellate court to review the rulings of the trial court on questions actually brought to the attention of that court and decided by it. An objection to the introduction of testimony which states no ground for the objection deserves no consideration in the trial court and will receive none in this Court. And a party cannot urge one ground in the trial court and another on appeal. These rules are essential to preserve the character of this Court as a court

of review. Elliott App. Proc., Sections 770, 771. An appellate court can consider only such matters as are properly of record and a matter not appearing of record has no existence as a predicate for error. When the record does not affirmatively show error duly excepted to in the lower court, and duly assigned for error there, the presumption obtains that no error was committed. As the right of the plaintiff to maintain this suit in his own name was not questioned, so far as the record shows, on the trial of the cause in the lower court, and was not there assigned for error, this Court cannot consider it."

Paxton *v.* Brown, 10 C. C. A., 135; 61 Fed. R., 874.
Mitchell *v.* Markes, 10 C. C. A., 306; 62 Fed. R. 139.
Taylor *v.* Commercial N. Bank, 10 C. C. A. 429; 62 Fed. R., 383.
See cases cited Dig. Sup. Ct. Reports, L. A. C. Vol. 1, p. 148–1496.

The plaintiff in error must be held to have waived the objection to the sufficiency of the allegations of the complaint now for the first time presented.

The Telegraph *v.* Gordon, 14 Wall., 258.

The case of Roberts *v.* Graham, 6 Wall., 578, is decisive of the questions raised upon the question of the admissibility of evidence showing special damages.

Mr. Justice Swayne, Id., p. 579, said:

"It is objected that the plaintiff was allowed to recover for a special damage not alleged in the complaint. As a general proposition, that cannot be done. Special damage, whether resulting from tort or breach of contract, must be particularly averred, in order that the defendant may be notified of the charge and come prepared to meet it.

"Special, as contradistinguished from general damage, is that which is the natural, but not the necessary, consequence of the act complained of. * * *

"The objection of variance not taken at the trial, cannot avail the defendant as an error in the higher court, if it could have been obviated in the court below; nor can it avail him

on a motion for a new trial. Mosher *v.* Lawrence & Westcott, 4 Denio, 421 ; Lawrence *v.* Barker, 5 Wendell, 305. If parol evidence be received without objection, to prove the contents of a record, it is sufficient for that purpose. Newberry *v.* Lee, 3 Hill, 523. In McMicken *v.* Brown, 6 Martin, N. S. 86 ; see also Goslin *v.* Corry, 7 Manning & Granger, 347, and Doe *v.* Benjamin, 9 Adolphus & Ellis, 644, the defendant made no objection to the introduction of the testimony but prayed the court to instruct the jury that it was insufficient to warrant a verdict against him. The jury found for the plaintiff. It was held by the appellate court that he should have objected to the admission of the evidence, and that, not having done so, he was concluded by the verdict. The judgment was affirmed.

"In the case before us the plaintiff was entitled to be apprised of the objection, if it were intended to be relied upon, at an earlier period in the progress of the trial. The court *would doubtless have permitted an amendment if deemed necessary upon such terms as the interests of justice might seem to require.*

"The defendant's right to make the objection was waived and concluded by the delay. He could not make it at the time and in the manner it was presented."

See remarks of Mr. Justice Harlan in Denver, etc., R. R. *v.* Harris, 122 U. S., 597, near the bottom of page 608.

There is not a single exception relied on by the plaintiff in error which is not open to the objections presented by these authorities and without repeating them under each assignment of error the defendant claims their full application.

II (E. 1.)

The plaintiff in error, evidently deeming it unwise to rely upon the new and technical objection urged under (I. E. 1, 2, 3) of his brief, return to the first alleged error, treating it as if there had been an allegation of special damage in the declaration.

As to Errors 1–2.

To contend that such testimony is inadmissible would be taking away the foundation of the argument urged under this head of the brief of plaintiff in error. The learned counsel says, brief, page 8, near bottom: "Had there been an allegation of special damage in the declaration under which evidence as to the income of the plaintiff would have been admissible, the proper question would have been, 'What are the wages a man would receive for doing the work you personally did?'"

The question out of which the abandoned second error grew was, Record, p. 7: "Now, you may answer the question the Court says, Mr. O'Reilly, how much a year did you make fairly by you own individual exertion?"

This Court cannot ascertain whether there was actual error in the admission of evidence under this part of the case by discarding a portion of the evidence. The whole testimony, as shown in the Record (pp. 5–8), must be taken together to fairly determine this question.

To show the plaintiff's capacity to earn money and the disability consequent upon the injury inflicted upon him by the defendant's negligence, the witness was permitted to describe his business generally, but with no attempt and no admission to prove the profits of such business (Record, pp. 5–8). The whole testimony discussed in brief of plaintiff in error under (II, E. 1), was but preliminary to the question, "How much did you make fairly by your own individual exertion," which forms the abandoned second error.

The brief of the plaintiff in error says (p. 9): "It is stated in the bill of exceptions that 'The Court made no ruling that the plaintiff might prove the profits of his business.'" (Record, p. 8.) No complaint is made by the defendant that any such general ruling was made. But the defendant does rely on its exception to the specific ruling which the

Court did make permitting the plaintiff to testify how much he made at running the steam thresher. (Record, p. 6.)

The record, however, disclosed that the counsel who tried the case did, in two separate statements (Record, pp. 7–8), undertake to claim that the Court was admitting evidence of the "profits of the business," and the Court expressly denied it, and as it must be assumed that the Court properly charged the jury on the evidence this Court must presume that no injury was done the defendant.

To measure the pecuniary loss to which plaintiff had been subjected by his injuries, his counsel undertook first to describe his various kinds of occupation (Record, p. 6) within a reasonable period prior to the accident. The witness, preliminary to the question of how much he earned by his individual exertions, was permitted to describe the financial result of his business generally, but with no attempt to prove and no admission by the Court to prove the profits of his business. The whole testimony led up to the question and answer which formed the second ground of alleged error, viz: "How much did you make fairly by your own individual exertions?" We submit there was no error in this.

In an action by the employee for personal injuries the elements to be considered in determining damages are plaintiff's former occupation, the amount of money he received from it, and the extent to which the act of defendant has injured his capacity to perform the duties of that or any other calling for which he is fitted. (Seabord Manufacturing Co. *v.* Woodson, Ala., 11 So. Rep., 733.)

Plaintiff having been for a considerable time disabled to carry on business it was competent to prove as an element of damages "what he was making at the time he was disabled." (Ala. G. S. R. Co. *v.* Frazier, Ala., 9 So. Rep., 303.)

Evidence of plaintiff's average earnings in his regular business which he was prevented from pursuing by the in-

jury complained of is admissible, although at the time of the injury he was temporarily engaged in other work.

City of Galesburg *v.* Hall, 45 Ill., App., 290.

In an action for personal injuries evidence as to the plaintiff's net earnings in his trade is admissible.

Wallace *v.* The Western (N. C.) R. Co., 10 S. E., 552.

In assessing damages for personal injuries, the jury should take into account * * * loss of what he might otherwise have been earning in business or profession, and of what the injured person has been deprived of earning by any permanent disability.

Wheelan *v.* The N. Y., L. E. & W. R. Co., 38 F., 15.

It is competent to show the business and earnings of plaintiff in order to ascertain the damages for loss of time.

Lynch *v.* Brooklyn City R. Co., 5 N. Y. S., 311.

In an action for personal injuries the nature and extent of the plaintiff's business and the time he was prevented from attending to it are material upon the question of damages.

Clifford *v.* Dam., 44 N. Y. Sup. Ct., 391.

In Grand Rapids & Ind. R. R. *v.* Martin, 41 Mich., 667, the plaintiff's "business was making gloves and lashes, and his own part in the business was chiefly attending to cutting the gloves and seeing to the tanning and mixing the tanning materials." The Court (p. 671) says "that it was competent to give such full account of the plaintiff's business as to show how far he was affected in it, and this could not be done without showing its nature and extent. There was no evidence received as ground of damages beyond his pecuniary loss by reason of the suspension of his personal oversight and labor. There was no error in this regard."

Evidence of the amount of the plaintiff's earnings is admissible, not as a basis of computation, but as a circum-

stance tending to show his capacity and disposition to earn money.

Simpson *v.* The C., R. I. & P. R. Co., 49 Iowa, 87.
Louisville E. & St. L. R. R. Co. *v.* Clarke, 152 U. S., 230–242.
Nebraska City *v.* Campbell, 2 Blach., 590.
Wade *v.* Leroy, *et al.*, 20 Howard, 34, 43, 44.
Vicksburg & Meridan R. Co. *v.* Putnam, 118 U. S., 545–554.

In the last case it was held that—

"In an action for a personal injury, the plaintiff is entitled to recover compensation, so far as it is susceptible of an estimate in money, for the loss and damage caused to him by the defendant's negligences, including not only expenses incurred for medical attendance, and a reasonable sum for his pain and suffering, but also a fair recompense for the loss of what he would otherwise have earned in his trade or profession, *and has been deprived of the capacity* of earning by the wrongful act of the defendant."

Ballew *v.* Farnum, 11 Allen, 73.
New J. Express Co. *v.* Nichols, 3 Vroom, 166, and 4 Vroom, 430.
Phillips *v.* London and Southwestern Ry., Q. B. D., 406; 5 Q. B. D., 78; 5 C. P. D., 280; S. C., 49 Law Journal (Q. B.), 233.

Mr. Justice Gray, in the case of Vicksburg & C. R. Co. *v.* Putnam, *supra*, page 554, said:

"In the important and much considered case of Phillips *v.* London & Southwestern Railway, above cited, the judges strongly approved the usual practice of instructing the jury in general terms to award a fair and reasonable compensation, taking into consideration *what the plaintiff's income would probably have been, how long it would have lasted, and all the contingencies* to which it was liable."

In Richmond & Danville R. *v.* Elliott 149, U. S. 266–268, Mr. Justice Brewer said:

"It is enough to prove what the plaintiff had been de-

prived of; to show his physical health and strength before the jury, his condition since, *the business he was doing.*"

See Serensen *v.* Northern Pac. R. Co., 45 Fed. Rep., 407.

In District of Columbia *v.* Woodbury, 136 U. S., 450–459, Mr. Justice Harlan said (p. 459):

"All evidence tending to show the character of his ordinary pursuits and the extent to which the injury complained of prevented him from following these pursuits, was pertinent to the issue."

See cases cited in opinion.

III (E. 3).

The testimony on this error is found on page 8. It is difficult to understand how the defendant was prejudiced in this question and answer.

In addition to the authorities already cited upon the admissibility of this testimony the language of Adams, J., in Simonson *v.* The C. R. I. & P. R. Co., 49 Iowa, 87, is pertitinent. On page 97 the Court says:

"Again, if a man is killed whose earnings have been charged and who has retired from business, with no intention of resuming, it is not certain that he is injured in reference to his prospective estate, yet because he might resume, a jury would not be justified in a cause of action to the extent of the injury in allowing nothing for the injury sustained in reference to his prospective estate."

IV (E 4).

The fourth alleged error is that the Court, against seasonable objection and exception, permitted Mrs. Lahey, a sister of O'Reiley, who acted as his nurse, to testify upon direct examination, in answer to questions of the plaintiff's counsel, that the plaintiff had told her after the occurrence that he had taken a nail out of his knee.

This nail had been subsequently lost. It appears in testimony that Mrs. Lahey, being neither a professional nurse nor a physician, had acted as plaintiff's nurse during his sickness; that about ten months after the accident sores and ulcers had broken out about the knee. The plaintiff testified himself that on the 11th of October, 1887, he had taken a piece of nail from one of the sores, and that the nail had been lost. The size and shape of the nail were in dispute—page 8 of Record. The testimony bearing on this exception is found on pages 8 and 9 of the Record.

So far as the record shows, the defendant did not dispute the fact testified to by O'Reilly that he had, on the 11th of October, 1887, taken a piece of a nail from one of the sores on his knee. This fact was proved not by hearsay, but by the personal knowledge of the witness O'Reilly. The dispute about the nail was not that no nail was taken from the sore on the knee, but what was "the size and shape" of the nail so taken away. The nail was lost. To describe the nail and make comparison with one shown witness at the trial, she was permitted to state that O'Reilly had called her attention to the nail just after it came out. She examined it, and then described it by comparing it with one shown her by counsel.

Such testimony is not open to the objection that it is hearsay. Its object is the identification of a time, place or thing. It was *not* to prove the fact that a nail came out of the sore on the knee, but it showed that witness remembered seeing a nail of given size and shape, which was the *same* one the plaintiff said came out of the sore. This class of evidence is in common use in trials, is necessary for the legitimate purpose of identification, and is illustrated by the following cases:

If a witness testified that he saw "a man they said was J. M.," the evidence is not open to the charge of being hearsay; the import is, a man called J. M.

Willis *v.* Quimby, 31 N. H. (11 Foster), 485.

Testimony was offered by the plaintiff in an action to prove that certain lads were introduced by a third person to the plaintiff, "as the boys the defendant has spoken about," which was objected to on the ground of being hearsay. Held that such testimony was admissible to prove the fact of such introduction.

Loomis *v.* Smith, 17 Conn., 115.
Stewart *v.* Chadwick, 8 Iowa, 463.

The conversations of third parties with a witness are not inadmissible, if only offered to show what it was that called the witness' attention to a fact that he has testified to or fixed it in his recollection.

State *v.* Fox, 25 N. J. L. (Dutch), 566.

A witness may state what a third person said for the purpose of identifying a particular occasion or date.

Hill *v.* North, 34 Vt., 604.

Hearsay evidence of the fact of the killing of some one upon a certain day is admissible to show the date at which something else occurred about which the witness has testified.

Harris *v.* Cent. R. R. (Ga.) S. E., 355.
Pringle *v.* The C., R. I. & P. R. Co., 64 Iowa, 613.

The brief of plaintiff in error (p. 12) says the admission of this testimony was "palpably an attempt to buttress the testimony already given by the plaintiff."

The brief had already said (p. 11): "The plaintiff claims that it is admissible for the special purpose of showing the identity of the nail *and it seems to have been admitted for no other purpose.*"

The italics are our own. The statement that it was to "buttress the testimony already given by the plaintiff after the prior admission, is controlled by that of the Court (Record, p. 9) that "The testimony objected to was admitted for the purpose of showing the identity of the nail de-

scribed by witness with that taken from the wound on the plaintiff's leg."

V (E. 4, 8, 9 AND 13).

Our brief has already considered the fourth alleged error.

The eighth alleged error is:

"That the Court, against seasonable objection and exception, permitted Dr. McCann, the attending physician, to testify upon direct examination, in answer to questions of plaintiff's counsel, that the plaintiff, O'Reilly, told him one morning that a piece of nail had come out of his knee during the night."

The testimony bearing on this exception is found in Record, page 11.

The ninth alleged error is:

"That the Court, against seasonable objection and exception, permitted Dr. McCann, the attending physician, to testify upon direct-examination, in answer to question of the plaintiff's counsel, as follows: Q. Now, will you tell us, you, his physician, go there, and he told you what about where this nail came from? A. On the morning of the 11th of October I went in on my usual call, and he showed me this piece of nail, saying it came out of his knee during the night."

It will be noted that the facts as to the statement of O'Reilly are very similar to those disclosed in the fourth alleged error, except that in this instance it was made to the attendant physician instead of the nurse.

There are two grounds upon which the admissibility of this evidence is sustained: (1) to identify the nail seen by the physician as the one which plaintiff says came out of the sore; (2) upon the more general ground that such a statement to a physician is admissible, when made in the course of his attendance to effect a cure of the injury.

The plaintiff in error contends that "neither the evidence of Mrs. Lahey that the plaintiff told her that he had taken the nail out of his knee nor the evidence of Dr. McCann, the attending physician, that the plaintiff had made a like statement to him, nor the evidence of Dr. McCann pointing out the scar of the hole that the plaintiff told him the nail came out of was competent on any ground."

Dr. McCann's testimony can only rightly be examined by reference to the record.

Dr. McCann, Record, p. 11, testified that in October, 1887, ulcers broke out upon and about the knee; that he treated them antiseptically, and gave it as his opinion that some foreign substance or disease of the bone would be a sufficient cause for the ulcers.

He further testified that when he called one morning the plaintiff showed him a piece of a nail and told him that it came out during the night.

Dr. McCann was O'Reilly's attending physician, and while under his treatment the information was imparted. The question is, whether under these circumstances this testimoney was admissible.

This question has been answered in favor of the admissibility of such evidence by the Supreme Court of Massachusetts.

The statements of the patient to his physician as to the character and seat of his sensations made for the purpose of receiving medical advice are competent evidence in his favor in an action to recover damages for a personal injury even though such statements were not made until after the action had been brought.

Barber *et ux. v.* Meriam, 11 Allen (Mass.), 322.

In Fay *v.* Harlan, 128 Mass., 244, Ames, J., says: "It is well settled that the declarations of the patient as to his symptoms and complaints to his physician for the purpose

of medical treatment and advice are competent and admissible evidence. They are not to be considered as mere hearsay, and, if made, to be acted on in a matter of grave personal concernment in relation to which the party has a strong and direct interest to adhere to the truth."

In Roosa *v.* Boston Loan Co., 132 Mass., 439, Endicott, J., says: "While the witness, not an expert, can testify to such exclamations of pain as to indicate present pain or suffering, *the physician may testify to statements and narratives given by the patient in relation to his condition, symptoms, sensations and feelings, both past and present.*"

Fleming *v.* Springfield, 154 Mass., 520.
Commonwealth *v.* Leech, 156 Mass., 99.

In Norris *v.* Haverhill, 65 N. H., 89, Bingham, J., said: "The rule is still in this State that representations of a sick person of the nature, symptoms and facts of the malady under which he is laboring at the time are admissible."

Washburn County *v.* Pearson, 120 Ind., 426.
Cleveland, C., C. & I. R. R. Co. *v.* Newell, 104 Ind., 264.
Wharton on Evidence, Sec. 268, note 2.

All the authorities agree that the statements of the patient to his physician, not as to the cause of his injury, but as to his bodily conditions or facts and symptoms in relation to it made for the purpose of treatment, are properly admissible in evidence.

Kansas City, Ft. S. & M. R. Co. *v.* Stoner, 51 Fed. Rep., 649.
Same case, 2d C. C. A. Reports, 437.
Union Pacific R. R. Co. *v.* Novak, 61 Fed. Rep., 573.

In Insurance Co. *v.* Mosley, 8 Wall., 397, the question presented by the error was not under consideration directly. The observations of Mr. Justice Swayne (p. 408) sustains the position of the plaintiff. He says:

"Where sickness or affection is the subject of inquiry, the sickness or affection is the principal fact. The *res gestæ* are

the declarations tending to show the reality of its existence, and its *extent* and *character*. The tendency of recent adjudications is to extend rather than narrow the scope of the doctrine. Rightly guarded in its practical application, there is no principle in the law of evidence more safe in its results. There is none which rests on a more solid basis of reason and authority."

Perkins *v.* The Concord R. R., 44 N. H., 223.
Howe *v.* Plainfield, 41 N. H., 135.

In Pringle *v.* the C., R. I. & P. R. Co., 64 Iowa, 613–617, Beck, J., says: "IV. The plaintiff testified that a piece of the bone of his fractured leg came from the ulcer caused by the injury. A woman who nursed him while he was confined to his bed was, against defendant's objection, permitted to testify that the plaintiff at the time called her to him and exhibited a piece of bone which he declared he had just taken from the wound. The evidence is competent for the reason, for no other, that it tended to corroborate plaintiff's testimony as to the extent of his injury."

ERROR 13.

The thirteenth alleged error is:

"That the Court, against seasonable objection and exception, permitted Dr. McCann, when recalled at the end of the plaintiff's case, in answer to question by plaintiff's counsel, to point out upon the plaintiff's leg the scar of the hole out of which the plaintiff told him the nail had come."

The testimony relating to this exception is found in the Record, page 13. Dr. McCann was recalled near the end of the case by the plaintiff's counsel and examined the plaintiff's leg in the presence of the jury. Dr. McCann had testified, Record, p. 11, that the mark still remained on plaintiff's leg.

The Record, p. 11, is ambiguous as to whether this particular answer was objected to and an exception saved. It

is not made one of the alleged assignments of error. The question asked was—

"Where is the scar of the hole that your patient showed you it came out through?
"Mr. Strout: I object to that.
"The Court: I admit it.
"Mr. Strout: I take an exception.
"A. There (pointing).
"Q. Where are the scars of the other ulcers?
"A. There is one and there is the other."

So far as the words "that your patient showed you it came out through" are concerned, they evidently were intended to identify a place on the knee of plaintiff where evidence of disease remained.

Under the authorities cited it is admissible to show that the plaintiff told his physician that the nail came out near the knee; it certainly is admissible to show the jury the physical evidence.

VI (E 12).

The twelfth alleged error is—

"That the court, against seasonable objection and exception, permitted Dr. Cilley aforesaid to testify upon direct examination, in answer to question of plaintiff's counsel, as follows: 'Q. Did you see, doctor, anything in Dr. McCann's treatment of him or what it had been that you could find objection to? A. As far as I understood his treatment I saw nothing to except to, so far as he explained it to me.'"

Dr. Cilley was called as an expert, and it is conceded that he was one.

The Record, page 5, shows that "the plaintiff offered evidence tending to show that he had used due care in procuring a suitable surgeon to attend him after the accident, and the defendant offered evidence to the contrary."

What treatment Dr. McCann actually gave the leg does not appear from the record to have been a matter seriously in dispute. The contention seems to have been whether the treatment actually given was proper.

The brief of the plaintiff in error, in its opening paragraph on this alleged error, seeks to give this Court to understand that Dr. Cilley had no knowledge of Dr. McCann's treatment, because at the several times he had seen the plaintiff it was for the purpose of ascertaining his present physical condition. In another part of the brief (p. 19) it is asked: "Is he to answer by what he had heard Dr. McCann testify to or *from his own information?*"

The question relates *not* to a question of opinion on facts which were the basis of a hypothetical question, but rather to the *discovery through his own personal knowledge of a fact* in relation to the treatment. If Dr. Cilley at the several times he saw O'Reily saw *nothing* of the treatment at all, then he would say so. If he did see any of the treatment, and so testified, he might then be cross-examined by the defendant to ascertain whether that which he called a fact was obtained through his personal knowledge or was mere hearsay.

The question objected to did not call for Dr. Cilley's understanding of the treatment, but whether he saw—that is, found—any fact in Dr. McCann's treatment—anything which as a medical expert he disagreed with.

The question was one which might properly be asked in a general way. So far as the question is concerned it does not fall within the line of the cases relied on by the plaintiff in error.

He was not asked what he *understood* but what he *saw* in the treatment; and it is fair to assume that the witness used the word "understood" in the sense in which the question was asked.

Dr. Cilley's answer was in part responsive and in part not.

The answer was complete when the witness had said, "As far as I understood his treatment I saw nothing to except to." The witness added, "So far as he explained it to me."

The full answer presents a case, therefore, where the answer is in part unobjectionable and in part what may possibly be regarded as objectionable.

The defendant's counsel in making the objection did not undertake to separate the parts, *but made a general objection to the whole.*

Such an objection is not tenable. The defendant should have pointed out what his objection was.

It ought to be shown that the objection was accompanied with specific reasons before this Court is asked to sustain the plaintiff in error.

The objection was—

"Mr. Strout: I object to the answer also—"

It will be noticed that defendant's counsel did not claim an exception to this ruling—the Court remarking:

"Well, the answer is admitted, and the exception is allowed."

We call attention to the numerous authorities cited under I (E. 1, 2 and 3) of this brief upon the point that a general objection is insufficient in this Court.

It was the duty of the defendant's counsel to move seasonably to have that part of the answer striken out if it was in part objectionable.

In Northern Pac. R. Co. *v.* Charless, 2 C. C. A., 380; 56 Fed., 56, it was held that the mode of examining a witness is within the discretion of the Court, and it is not error, threfore, to allow a witness to give his testimony in a narrative form, *and* if he states matters irrelevant or incompetent

it is the duty of the party objecting to arrest the narrative and move to have such testimony stricken out:

(See opinion Id. pp. 388, 389.)
(United States *v.* McMasters, 4 Wall., 680–682.

In Gould *v.* Day, 94 U. S., 405, Mr. Justice Field, p. 414, said:

"The objection to the testimony of the witness, Heather, in answer to the question whether he could form a judgment of the quantity of timber which had been on certain pine-timber lands from the stumps that remained is untenable, for it was not taken in the Court below.

"The question was then objected to, not the answer.

"The question only inquired as to the witness's ability to judge from an existing fact what a previous fact might have been, and in itself was unobjectionable.

"*If his answer went* beyond the question, it was to that the objection of counsel should have been directed by a motion

Pattison's Railway Accident Law.
Sec. 397.
Klutts v St.L.I.M.& S.Ry.,75 Mo.642; 11 Am.& Eng.R.R cases 639; Nagel v M.P.Ry.,id.653; 10 Am.& Eng.R.R. cases 703; Sauter v N.Y.C.& H.R.R.R.,66 N.Y.50; Lyon v E.Ry.,57 id.489; P.P.C.Co. v Bluhm, 108 Ill. 20; 10 Am.& Eng. R R.cases 87; Allender v C.R.I. & P. R. R. 37 Iowa 264.

In relation to this exception the record, p. 15, shows that—

"Upon the direct examination of the plaintiff he proved that there had been an accident, causing the derailment of cars and injury to the plaintiff. The defendants thereupon offered testimony tending to show that the utmost care had

been used by the defendant, *and also tending to show that the cause of the accident was the breaking of the journal of an axle* near the *wheel*, and that the utmost care was used by the defendant to detect and prevent a break."

Upon rebuttal, the plaintiff called J. V. Meighs, an expert, who testified in answer to the question which is the subject of this alleged error.

The plaintiff's declaration Record, p. 4, claimed that one of the causes of the accident was "*the insufficiency of the journal of the tender of the engine which hauled the car in which he (the plaintiff) was riding.*"

The plaintiff proved that there had been an accident, causing derailment of cars and the injury.

The burden of excusing the accident then rested on the defendant. Gleeson *v.* V. M. R. R. Co., 140 U. S., 435.

To sustain this burden the defendant offered evidence (1) "tending to show that the cause of the accident was the breaking of the journal of an axle near the wheel," and (2) "that the utmost care was used by defendant to detect and prevent a break."

Thus the record discloses that the defendant took the initiative in proving that the cause of the accident *was that which the plaintiff had alleged in his declaration.* The defendant, in other words, furnished the plaintiff with proof to sustain his allegation.

How, then, could the defendant be prejudiced by testimony that the cause which *it alleged* was the most fruitful cause of railroad accidents? Instead of injuring defendant it helped it sustain this branch of the defense. This defense was one branch only, and could not defeat the action unless defendant went one step further and showed that in this particular it had used the care which as a carrier of passengers for hire it was bound to use. The verdict of the jury settled this second part of the contention against it and in favor of the plaintiff.

Apparently the learned counsel for the plaintiff in error is unaware of the nature of the contention made by his company at the trial.

On page 21 of his brief he says:

"From the fact that most railroad accidents aside from collisions are caused by broken axles, no *inference* can be *drawn that this did not arise from some other cause*, and therefore this evidence had no probative force as to the cause of the accident, and was not admissible on that issue."

The fair inference from this language is that the defendant claimed at the trial that the accident was *caused* by *some other thing than a broken axle*, while the *contrary* is the statement of the bill of exceptions.

If, as the record shows, the defendant offered testimony "tending to show that the cause of the accident was the breaking of the journal of an axle near the wheel," and this expert witness was allowed to testify that the most common cause of accidents, leaving out collisions, was the breaking of axles, sustaining the contention of the defendant in the highest degree, it would be an extraordinary claim that the defendant was prejudiced by such testimony.

We invoke the rule laid down by this Court in Railroad Company *v.* Smith *et al.*, 21 Wall., 255, "To render an exception available in this court it must affirmatively appear that the ruling excepted to affected or might have affected the decision in this case."

In Holmes *v.* Goldsmith, 147 U. S., 150–164, Mr. Justice Shiras said:

"The modern tendency, both of legislation and of the decision of the courts, is to give as wide a scope as possible to the investigation of facts. Courts of error are specially unwilling to reverse cases, because unimportant and possibly irrelevant testimony may have crept in, unless there is reason to think that *practical injustice has been* thereby caused."